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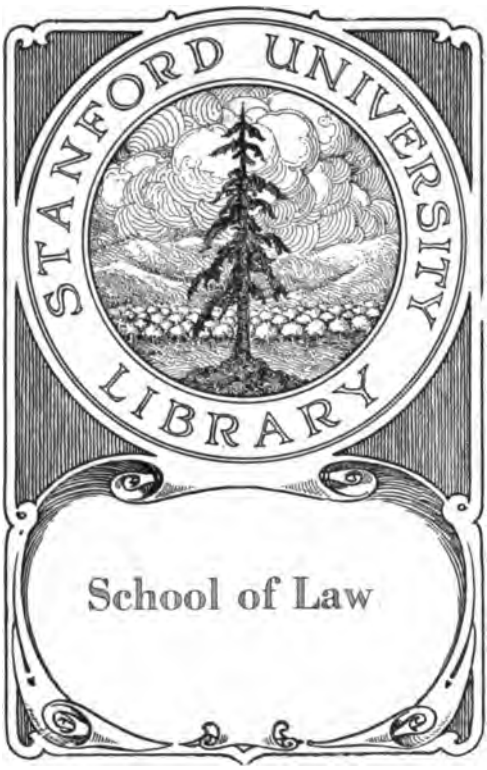

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THE publishers will pay full price for a few copies of Nos. 3, 4, 6, 7 and 8, of THE CANADA LAW JOURNAL for 1888.

Re Prittie and Crawford, a very recent decision by BOYD, C., under the Vendor and Purchaser Act, is of value to those who have to do with agreements for the purchase and sale of land. A. was the vendee of certain lands under an agreement such as is usually made for the purchase of lands where the purchase money or the greater portion of it is payable at a future date. He assigned his interest in the agreement to B., and B. completed the purchase and agreed to sell to C. When A. made the agreement to purchase the lands there was a writ of *fieri facias* in the hands of the Sheriff, binding his lands. C. contended that A.'s interest in the lands was liable to seizure and sale under the writ (which was kept renewed), but that if the lands were not seizable under the writ, it bound them by way of, or as a step to, equitable execution, and that the execution was a cloud upon the title. Upon an application under the Vendor and Purchaser Act, it was held that the execution against the lands of A. did not affect such an interest as he had under the agreement, and that it was no objection to the title.

LAW FOR LADIES.

IF a man out West wishes to keep his wife he must not play practical jokes upon her, nor treat her ailments, whether real or imaginary, with derision, deception or contempt. If he does so she may get a divorce from him in Illinois and leave him. The judges out in that State are (in some respects) the *creme de la creme* of politeness—veritable Admirable Crichtons. They hold that the perpetration of a practical joke shows one to be "a coarse man"; "no one of any refined sensibilities will ever practice a practical joke upon, *or relate one concerning his friend.*" The sentiment is that of one of the Illinois judges. The italics are ours, and lead us to remark,

> "Alas for the rarity
> Of refined sensibility
> Under the sun!"

But about the couple that forms the subject of our present discourse, Mr. and Mrs. Sharp. Mr. Sharp complained often of Mrs. Sharp's medical expenses; he said he didn't "believe in paying doctor's bills," and that she "ought to die and go to heaven." The Court didn't like these expressions of his. (Will the learned Editress of the *Chicago Legal News* tell us why? Was the judge an

unbeliever in the pleasures and delights of heaven? Did he think that no doctor presents his bill in heaven? Or did he think that the husband, if he had been a loving one, would have expressed the wish devoutly that his wife might go to the other place—the warm place—because of her neuralgic pains?) However, to proceed. The Court went on—"On one occasion when she had the neuralgia, she wanted the 'extract of lettuce.' He (Sharp) took an empty bottle and pretended to get it for her, and instead of doing so he filled the bottle with foul water taken from a tub outside the house. After she had used it, he said she expressed herself as much benefited by its use . . . He then told her it was not the 'extract of lettuce' at all, but that it was a vile liquid . . . The excuse given for the deceit does not relieve the defendant (Sharp) from the severest censure. The least that can be said of it is, it was a 'practical joke,' the perpetration of which shows he is a coarse man. No matter what his motive may have been, his wife had serious grounds for complaint on account of the deception practised upon her. It was very unkind, to say the least of it." (We would add, "it was sharp practice too.") She got a divorce for this and sundry other ills of his. By the way, what would this learned Judge say of medical men and their pills of bread and draughts of sugar and water? *Sharp* v. *Sharp* 116 Ill., 509.

"Silence is golden," say the Persians. "If a word be worth a shekel, silence is worth a pair," say the Hebrews; but the Western Court in *Sharp* v. *Sharp* (*supra*) belonged to a different school of philosophers, and held that to live in the same house with a wife for ten years and not to address her "either in anger or in kindness," "ill accords with the duty of a husband to his wife." "It is difficult to imagine anything more disagreeable and exasperating than the presence of one who from mere sullenness will not utter a word. The veriest solitude, where no living creature is visible, would be preferable." Out West, taciturnity appears to be a ground for divorce.

In New Jersey, if a man talks too much and steals the engagement ring from his wife, she may get a divorce. The period of conjugal felicity which McKean and his wife—according to the judgment of Bird, V.C—enjoyed, was measured by a few months. Then came separations and wanderings, charges and recriminations. But," says the judge, "after her return to her parents, he (McKean) called upon her and had a private interview with her. During this interview he asked for her engagement ring, and promised her upon his honor to return it to her. He did not return it. He left her then and took the ring with him. He says that he told her she could have it again if she would live with him. She says that he took and kept it without any qualification whatever. In my judgment, this act of the husband in taking this ring and carrying it away, without any subsequent efforts at reconciliation, is most ample proof of a determination to separate himself from his wife and to desert her, unless it is made to appear that she was first in fault, and had taken some step to sever the marital relation. I find no such fault in her conduct, although not in all respects of the highest rectitude. Why did the husband want a private interview? He asked her father for such an interview. I conclude it was for the sole purpose of securing the engagement ring, and of thus proving to her the

entire absence of all affection or regard." The wife got a divorce notwithstanding his assertion that he loved her, and was willing and anxious to live with her as his wife. Alack, alack, well-a-day! the difficulties that now beset a poor man's path! A private interview with a man's own wife, with her own father's consent, may now be brought up in judgment against him. Formerly the danger lay in private interviews with other men's wives: *McKean* v. *McKean*, New Jersey Ct. of Chy, 34 Albany L. J. 242.

We understand from what others have told us, that one of the most difficult things a young lady ever has to decide is what to do with the rings, photos, books, etc., which her Romeo has given her during the happy engagement days, when the love of Romeo has grown cold and the engagement is broken off. To return or not to return? That is the question. With regard to some gifts, such as candies, ice-cream, sweets and kisses, no such troublesome query occurs; they have all melted away. Miss Kraxberger has settled for the benefit of her unmarried sisters, that the engagement ring may be returned to him who has broken his plighted troth, while at the same time she may make him pay heavily in damages for trifling with her affections, and injuring her prospects of settling with some other one for life. List to the graphic way in which the Judge of the Supreme Court of Missouri speaks: "Fully realising then" (because he had just told her so), "that she had indeed lost the love that he had once assured her was hers, and upon the faith of which she had engaged herself to him, and that his determination not to marry her was final and conclusive, she takes from her finger the engagement ring once given her as a token of his sincerity and fidelity, now a memento only of his fickleness and treachery, and in her express words, 'gave it up to him,' and went crying from his presence. This, forsooth, is claimed to be evidence that the plaintiff agreed to rescind the contract and release the defendant from the obligations thereof. . . . The defendant by his own action had left her no choice in the matter: nothing that she could do but accept the situation he made for her, abandon all hope of the marriage, give up the symbol of that hope, and seek such compensation in damages as the law could give her for the injuries she had suffered, without fault on her part, at the hands of the defendant; and this, the only remedy left her, she seeks in this case." And she got it: *Kraxberger* v. *Roster*, 91 Mo., 404.

Evidently it is dangerous trifling with an engagement ring; steal it and you lose your wife; take it when offered and you may lose your money; leave it and you may lose your quiet repose, peace of mind—everything.

Though it appears to be a risky thing for a husband to steal his wife's rings—at least when the matter comes before a dissolving judge—still a wife is not guilty of felony if she steals her husband's goods; because as husband and wife are considered but one in law, and the husband by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in all of them. Nor is she guilty of larceny if she steals goods deposited with her husband in which he has a joint property; for instance, if he is a member of a friendly society and the treasurer of the funds, she may take them without being a thief. And even a third party to whom the wife may give these abstracted

goods cannot be held guilty of larceny. If, however, the wife elopes with a lover, taking with her the goods of her husband, and gives them to her naughty companion, who takes them away, this would be larceny, for in such a case the consent of the husband cannot be presumed: *Rex* v. *Willis*, R. & M.,C.C.C.R., 375; *Rex* v. *Solfree*, R. & M., C.C.R. 243; *Reg.* v. *Kenny*, 2 Q.B. 307 Schouler Dom. Relations, sec. 51.

This state of the law seems rather hard in the present age, when the wife is so highly favored and protected as to her own goods and chattels, *lares et penates;* and when every man does not now at the altar say to his bride, "with all my worldly goods I thee endow."

If a married woman be canny enough to keep her husband always by her, she may go through the world running amuck like a wild Malay, and do a great many queer things, for the law in its chivalry and gallantry will presume her to be innocent, and that she is coerced by her husband into doing these unfeminine actions: Russell on Crimes, ch. 1. Schouler Domestic Relations, sec. 49, 50. For *mala prohibita* she will not be punished, but for *mala in se* she is. Who can forget the words of Mr. Bumble on this point, when he began to fear the unfortunate little circumstance in which his wife had been engaged might deprive him of his "porochial office," and had remarked, "It was all Mrs. Bumble, she *would* do it." Mr. Brounlow said to him, "You are the more guilty in the eye of the law, for the law supposes that your wife acts under your direction." The parish beadle, squeezing his hat emphatically in both hands, replied, "If the law supposes that, the law is a ass, a idiot. If that's the eye of the law, the law is a bachelor, and the worst I wish the law is that his eye may be opened by experience—by experience." Oliver Twist, ch. 51.

Speaking of bachelors in these days of increasing taxation and deficits, and when the number of marriageable young women in the settled parts of the country is constantly and persistently becoming greater than that of marrying young men, and when the ballot is passing into the hands of the fair sex, how is it that a tax is not put upon bachelors? William III. of great, glorious, pious and immortal memory, gave his assent to such an act in April, 1695 (not on the first, but on the twenty-second of that month). The act was intituled, "An Act for granting His Majesty certain rates and duties upon marriages, births, burials, and upon bachelors and widowers, for the term of five years, for carrying on the war with vigour." By this, bachelors and widowers above 25 years old paid yearly one shilling, but a marquis who was a bachelor or widower, had to pay yearly ten pounds, while a duke in that solitary state had to pay £12 10s. These taxes were kept on until 1706. The laws of Rome had severe penalties for those who remained celibates after a certain age, and Lycurgus authorised criminal proceedings against those who eschewed wedlock. Louis XIV., throughout the length and breadth of Canada, whipped Hymen, if not Cupid, into a frenzy of activity—as Parkman says. Twenty livres were given to each youth who married before the age of twenty, and to each girl who married under sixteen. Any father of a family who without showing good cause, neglected to marry his children when they had reached the ages of twenty and sixteen, was

fined. Young men were ordered to marry within a fortnight after the arrival of the yearly cargo of women from France. No mercy was shown to the obdurate bachelor. They were forbidden to hunt fish, trade with the Indians, or go into the woods under any pretence whatsoever. So active was the market, that one young lady was married at twelve years of age, and a widow went to the altar afresh before her late husband was buried (The Old Regime). Ladies are in the legal profession without a doubt; in fact, it is only for them and their edification and delight that this article is written, printed and published; and one is almost led to believe that some of them have already donned the ermine, and sat down upon the bench, when one meets a judicial utterance such as the one in this case: A son-in-law sued for boarding his mother-in-law twenty-six and a half weeks (fortunately for the man this was not all at one time, but on five different occasions extending over four years); sometimes the lengthening out of these visits was made at the suggestion of the daughter, sometimes the doctor voiced the idea. The mamma-in-law never promised to pay, nor did the son-in-law succeed in proving that she had ever expected to be charged board. The Court—surely a mother-in-law—said, "It would be a crime against nature and humanity to give all the courtesies, favors, and visits that are exchanged between parents and children, the mercenary quality of dollars and cents: *Lawyer* v. *Hebard*, 58 Vt., 375.

Mothers-in law, as one would naturally expect from their number, have been before the Court prior to the time of 58 Vermont. *Mach* v. *Parsons* (1 Am., Dec. 17) sets forth a rule of comfort to husbands, namely, that a son-in-law cannot be held liable for the support of his wife's parents. And in New Hampshire it was decided that a coffin and grave clothes purchased by a man for his mother-in-law, who died a member of his family, were necessaries, so as to charge a trust fund: *Thompson* v. *Smith*, 57 N.H., 306.

In a certain stage of society one of the most extensive classes is that of "cousins." To the question, "Who is that down stairs, Jane?"—how promptly and universally comes the answer, "My cousin, ma'am." How important, therefore, is the query "Who is a cousin?" The Justices in her Majesty's Court of Appeal a couple of years ago wrestled with the question, but, alas! they differed in their decisions. Bowen L. J. was profound—went to the bottom—was geologically accurate and narrowly limited the genus. He said, "I start with the word 'cousin' being a term of which the dominant idea is consanguinity!" (Yea, verily, many a Betsy Ann and Eliza Jane would start too at such an idea). He proceeds, "It is not accurate to say that the wife of one's cousin is, even in a secondary sense, one's cousin . . . . The word cousin cannot be used in a secondary, or even in a tertiary sense, for a person not a relation in blood, though it can be used for a more distant relation than a first cousin." Fry, L. J. took a more extended view, and one more in accord with the notions of "life below stairs." We do not for a moment suggest that he knew the cook, but she must have known him by name. He said, "I agree with Lord Justice Bowen as to the proper signification of the word 'cousin,' that it properly means the children of brothers and sisters (we would have called those nephews and nieces), and implies consanguinity; but I think that it is sometimes used in a loose and vague

sense which does not imply consanguinity, as when the Queen addresses a nobleman, or a member of her Privy Council, as a 'cousin,' and when we speak of our 'country cousins.' I think that in popular language the word does apply to persons who are not related by consanguinity." L. R. 34 Ch. Div. pp. 259, 260. It must be satisfactory to mistresses to know that their helps may call all male visitors cousins, and still be consistent members of the Church, or of the Salvation Army.

No one has a right to complain that his next door neighbour plays upon the piano at reasonable hours, nor of the cries of children in his neighbour's nursery, nor of any of the ordinary sounds which are commonly heard in dwelling houses; but if a Ladies' Decorative Art Club take a house on a square filled with dwelling houses, and conduct classes in the art of metal working and hammering brass, so that the unusual and disturbing noises are of a character to affect the comfort of the household of the man living next door or the peace and health of his family, and to destroy the comfortable enjoyment of his home, the law will declare the ladies—or rather their classes—a nuisance, and stretch out its strong arm to prevent the continuance of such injurious acts. We never cared for hammered brass anyway: Re *Ladies Decorative Art Club of Philadelphia*, 37 Alb. L.J. 447.

One by one the beliefs of childhood's happy hours are dispelled. We used to believe in the reality of St. Nicholas, the shooting skill of Tell, the blue-beard character of Henry VIII., the greatness of Elizabeth, the goodness of Charles I., the beauty of Mary Stuart; but we don't know now. We used to think, moreover, that every woman could put any number of pins in her mouth without inconvenience; now the law papers tell us that at Greenwich (England) County Court, a widow sued a baker for damages, medical fees and loss of time, caused by a pin, which had been negligently left in a bath-bun, sticking in her throat, and the Judge said, "Of course it was an unfortunate accident for both parties, but he must give a verdict for the widow": 37 Albany L.J. 206

Talking of pins and women, a lady in Detroit fell upon a defective side-walk, and claimed that her right side was paralysed; on the trial to demonstrate to the jury the loss of feeling in that side, she allowed her medical man to thrust a pin into her. The city authorities objected to the jury pinning their faith to this sort of evidence, but the Court opined that there was no objection to her showing the extent of the paralysis which had supervened by reason of the accident, and that evidence that her right side was insensible to pain certainly tended to show this paralysed condition. The pin by which the experiment was performed was shown to the jury. There was nothing which tended to show any trickery. Counsel were certainly at liberty to examine the pin, and to ascertain whether in fact it was inserted in the flesh, and having failed to exercise this privilege, the Court's opinion was that after verdict it was too late to raise the objection that the exhibition was incompetent: *Osborne* v. *Detroit*, 26 Alb. L.J. 343. The judge overlooked the possibility of the City Attorney being a modest bachelor, and not accustomed to conduct cases against Phrynes.

Apparently ladies do not like to be called "cats," nor even to have their mothers called "cats." The funny newspaper reporter published an interview between the plaintiff and himself, in which, the plaintiff is represented as saying that her mother had been bitten by a cat and had hydrophobia, that she dreaded the approach of water . . . . that she acted like a cat purring and mewing, and assuming the attitude of a cat in the effort to catch rats, and did other like acts, and that a wonderful cure of this disease had been effected by a certain medicine called S.S.S., sold by defendants. It was held that all this was libellous: *Stewart* v. *Swift Specific Co.*, 76 Ga. 280. This seems a strange decision, because our own experience has been that girls like to be called Kitty, Pretty Kitty, Dear Kitty, or even Pussy.

It has been decided in Iowa that a wife has no right to chastise her husband, nor provoke him to retaliation by her own violence, foul abuse, and misconduct: *Knight* v. *Knight*, 31 Iowa, 451; nor has a husband now the right to correct his wife corporally, even though she be insolent to him or drunk (*Com.* v. *McAfee*, 108 Mass. 468). The Iowa decision just mentioned accords with the Laws of Menu; here we are told that "a faithful wife who wishes to attain in heaven to the mansion of her husband, must do nothing unkind to him, be he living or dead; she must always live with a cheerful temper, with good management in the affairs of the house, with great care of the household furniture, and with a frugal hand in all her expenses. Though enamoured of another woman, or devoid of good qualities, yet a husband must constantly be revered as a god by virtuous women; nor is a second husband allowed to a virtuous woman (chap. v, secs. 156, 150, 154, 162). It is evident that at some time or other the ladies in Persia must have interfered with the men while saying their prayers, now it is the law that no man may perform his devotions in the presence of any woman, who either at his side or before him is also praying; but it will be all right if there is a curtain between the two, or some object which prevents him seeing her; or if the woman is behind the man at such a distance that in prostrating herself she cannot touch his feet (Extract from the Shahr in Persia and the Persians, by S. G. W. Benjamin). This sapient law-giver must have had his sole tickled at some time or other.

Apropos of divorces the Koran says: "The husband may twice divorce and twice take back the same woman; but if he a third time divorce her, she cannot again become his wife till she have married and been divorced from some other man: *Sura II.* 230. With a little modification, this law might be useful in some of the States.

Speaking of second marriages at an early period in Vermont, by some strange perversion of legal principles people were led to believe that whoever should marry a widow who was the administratrix of her husband's estate, and should through her come into possession of anything that the late lamented departed had purchased, would render himself administrator in his own wrong, and himself liable for the estate and debts of his predecessor. The fascinating widows, however, found a way to overcome the difficulty, and smooth the way by which number two might approach Hymen's altar hand in

hand with number one's relict. Here is how the widow of Major Peter Lovejoy married Asa Averill. "By the side of the chimney in the widow's house was a recess of considerable size. Across this a blanket was stretched in such a manner as to form a small enclosure. Into this Mrs. Lovejoy passed with her attendants, who completely disrobed her, and threw her clothes into the room. She then thrust her hand through a small aperture purposely made in the blanket. The proffered member was clasped by Mr. Averill, and in this position he was married to the nude widow on the other side of the woolen curtain. He then produced a complete assortment of wedding attire, which was slipped into the recess. The new Mrs. Averill soon appeared in full dress, ready to receive the congratulations of the company, and to join in their hearty rustic festivities :" Hall's History of Eastern Vermont.

R. VASHON ROGERS.

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE Law Reports for December comprise 21 Q.B.D. pp. 461-588 ; 13 P.D. pp. 165-224 ; 39 Chy. D. pp. 185-696 ; and 13 App. Cas. pp. 505-835.

PRACTICE—CHARGING ORDER AGAINST MONEY IN COURT—STOP ORDER—ORDER ABSOLUTE, DATE FROM WHICH IT OPERATES.

In *Brereton Edwards*, 21 Q.B.D. 488, the Court of Appeal appear to have practically come to the conclusion that the jurisdiction of the Court to grant charging orders against moneys standing in Court to the credit of an execution debtor, has been extended by the Judicature Act. The line of reasoning adopted by the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) appears to be substantially as follows : By 1 and 2 Vict., c. 110, s. 12 (see R.S.O., c. 64, s. 17) the Sheriff was empowered to seize cash and cheques; formerly the Court of Chancery would assist the Sheriff to seize a cheque drawn by the Accountant in favor of an execution debtor (*Watts* v. *Jefferyes*, 3 Mac. & G. 422); and that following out this principle, there is now no reason why the Judge of any division of the High Court should not make an order charging money standing in Court to the credit of the execution debtor, in favour of the execution creditor. They also held that where an order *nisi* had been made, followed by an order absolute, that the latter related back to the date of the order *nisi ;* and further, that after the making of a charging order, it was unnecessary either to appoint a receiver of the fund, or to obtain a stop order against it.

PRACTICE—PLEADING—STATEMENT OF DEFENCE—AMENDMENT—MATTER IN MITIGATION OF DAMAGES CANNOT BE SET UP IN DEFENCE.

Wood v. *Earl of Durham*, 21 Q.B.D. 501, was an action to recover damages for a libel charging the plaintiff, a professional jockey, with unfairly and dishonestly riding horses in a particular stable. The defendant having pleaded a justification, subsequently applied for leave to amend his defence by adding a

paragraph alleging that at the date of the publication of the alleged libel, the plaintiff was commonly reported to have been in the habit of unfairly and dishonestly riding horses in races so as to prevent them from winning. But leave to make this amendment was refused by Manisty and Hawkins, J J. (affirming the order of Charles, J.) on the ground that as general evidence of the plaintiff's bad reputation (if admissible), could only be given in reduction of damages, and not in answer to the action, that the proposed amendment did not contain a statement of material facts on which the defendant relied for his defence within the meaning of Ord. 19, r. 4 (C.R. 399), or a ground of defence which must be raised under Ord. 19, r. 15 (C.R. 402), but was a denial or defence as to damages, within the meaning of Ord. 21 and 4, and therefore ought not be pleaded. Ord. 21, r. 4, of which we appear to have no counterpart, is to the following effect: "No denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted." But the effect of this Rule is probably covered by C.R. 403, which provides that 'save as otherwise provided, the silence of a pleading as to any allegations contained in the previous pleading of the opposite party is not to be construed into an implied admission of the truth of such allegation,' etc. In *Pursley* v. *Bennett*, 11 P.R. 64, however, facts were allowed to be set up in a defence in mitigation of damages.

PRACTICE—PRODUCTION OF DOCUMENTS—PRIVILEGED DOCUMENTS RELATING TO STATE AFFAIRS.

In *Hennessy* v. *Wright*, 21 Q.B.D. 509, the action was brought by the Governor of a colony to recover damages for a libel published by the defendant in a newspaper, alleging that the plaintiff had sent to the Secretary of State for the Colonies garbled reports of certain proceedings in the colonial assembly. The defendant pleaded that the statement was true. On an application for discovery of documents, the plaintiff made an affidavit that he had in his possession certain specified documents to the production of which he objected on the ground that they were copies of despatches and reports and other communications, with the conclusions referred to, which passed between the Secretary of State for the Colonies and the plaintiff, and between the plaintiff and the Royal Commissioner appointed to inquire into the affairs of the colony, and the plaintiff as such Governor, or between the Commissioner and the Secretary of State—that the attention of the Secretary of State had been drawn to the nature and dates of the documents, and he had directed the plaintiff not to produce or disclose the documents, and to object to their production. And in consequence of these instructions the plaintiff was unable to produce them. No affidavit or statement was made on behalf of the Secretary of State. It was nevertheless held by Field and Wills, JJ., affirming Denman, J., that it sufficiently appeared that the documents in question were privileged from discovery.

PROHIBITION.—APPLICATION AFTER JUDGMENT—DISCRETION TO REFUSE WRIT OF PROHIBITION.

In *Broad* v. *Perkins*, 21 Q.B.D. 533, an application was made after judgment to prohibit further proceedings in an inferior Court. The action was for libel, and

the ground on which the writ was claimed was that there had been no publication of the alleged libel which would give the inferior Court jurisdiction. The Court of Appeal (Lord Esher, M.R., Cotton, Lindley, Bowen, Fry & Lopes, L.JJ.) were unanimously of opinion that when the defect is not apparent, and depends upon some fact in the knowledge of the applicant, which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow the Court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, the Court will consider the conduct of the applicant, and the importance of making an end of litigation, and that the writ, though of right, is not of course, and the Court will decline to interpose, except perhaps in an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant. This rule, however, does not apply to the Crown, which may claim a prohibition at any stage.

TROVER—NEGOTIABLE SECURITIES—HOLDER FOR VALUE.

London & County Bank v. *The London & River Plate Bank*, 21 Q.B.D. 535, is an important decision of the Court of Appeal on the law of trover. In this case, certain negotiable securities were stolen from the defendants by their manager, and came into the possession of the plaintiffs for value, and without notice of any fraud. Subsequently, the manager obtained the securities from the plaintiffs by fraud, and restored them to the defendants, who did not know that the securities had been out of their possession. A portion of the restored securities were not the bonds actually stolen, but bonds of a like kind and value. The Court of Appeal (Lord Esher, M.R., and Lindley & Bowen, L.JJ.) affirming Manisty, J., held that in the absence of evidence to the contrary, it must be presumed that on the return of the securities to the defendants, they accepted them in discharge of their manager's obligation to restore them, and even though they were in actual ignorance of what was going on, and were therefore *bonâ fide* holders and entitled to retain the securities. Lord Esher, M.R., says at p. 539, "The defendants, when Warden stole these securities, could not only have indicted him for the theft, but they could have brought an action against him for the wrongful conversion of the securities. When he restored them, they lost their right, for how could they bring an action for the conversion of instruments which were in their own possession? I am of opinion that the destruction of this right of action is a value moving from them, and that it is immaterial that they did not know what they were doing. There is therefore a sufficient valuable consideration to make the case come within the ordinary rule applicable to holders of negotiable instruments obtained for a valuable consideration, and without knowledge of any kind, and therefore their right to hold these securities is complete."

CONSPIRACY—COMBINATION TO KEEP UP RATE OF FREIGHT—ENGROSSING PARTICULAR TRADE—EXCLUSION OF RIVAL TRADERS FROM COMBINATION.

The case of *The Mogul Steamship Co.* v. *McGregor*, 21 Q.B.D. 544, was noted *ante* vol. 21, p. 408, upon the motion for an interim injunction. The

defendants, who were firms of shipowners trading between China and Europe, with a view of obtaining for themselves a monopoly of the home tea trade, and thereby keeping up the rate of freight, formed themselves into an association, and offered to merchants and shippers in China who shipped their tea exclusively in vessels belonging to the defendants, a rebate of 5% on all freights paid by them. The plaintiffs, who were rival shipowners trading between China and Europe, were excluded by the defendants from all benefits of the association, and in consequence of such exclusion suffered damage. Lord Coleridge, C.J., before whom the action was tried, came, not without considerable hesitation, to the conclusion that the combination of the defendants was not wrongful and malicious, and that the acts done in pursuance of the combination were not unlawful, wrongful, or malicious, and that therefore the defendants were entitled to judgment.

DIVORCE—MARRIED WOMAN—CONTEMPT OF COURT—SEQUESTRATION—ENFORCING ORDER—CUSTODY OF CHILDREN.

The case of *Hyde* v. *Hyde*, 13 P.D. 166., though a matrimonial cause, embodies some points of general interest which it may be useful to refer to. The husband had obtained a decree *nisi* for divorce, and an order was made requiring the wife to give up the custody of his children to him. The order was not served personally on the wife, but it appeared that she knew of the order and had kept out of the way to avoid service. The children were not delivered up, and the father could not find out where they were. A further order was therefore made for a sequestration against the estate of the wife, and directing her mother, sister and brother-in-law, who were shown to be in communication with the wife, to attend to be examined as to their knowledge of the whereabouts of the wife and children. The wife was entitled under her marriage settlement to an income for her separate use, subject to a restraint on anticipation. On appeal from the order for sequestration, it was held by the Court of Appeal (Cotton, Bowen & Fry, L.JJ.), firstly, that the sequestration was properly issued without personal service of the previous order. Secondly, that it was no objection to the writ that it was in general terms, without expressly defining the property of the wife which was subject to sequestration. Thirdly, that the sequestration could not during coverture be enforced against future income which the wife was restrained from anticipating, but that the writ bound the arrears which were due when the order for the sequestration was made; but it was held that the order to examine the third parties could not be sustained. The power of the Court was limited, in this latter respect, to the power of the Court of Chancery to enforce its orders. And on this point Fry, L.J., says at p. 179: "Now I do not perceive that the Court of Chancery had any power to summon before it persons for the purpose of obtaining disclosure or discovery in aid of the execution of its orders. I am not speaking now of the power of the Court to summon persons to give information with regard to wards of Court—that is quite a different thing—but only so far as relates to discovery in aid of execution of orders of the Court. I am not aware of any such jurisdiction, and no case has been cited to us which supports the affirmative contention upon that point."

COLLISION—DAMAGES—REMOTENESS OF DAMAGE.

In *The Argentine*, 13 P.D. 191, the Court of Appeal was called upon to decide what was the proper measure of damages in the case of a collision. Previous to the collision the owners of one of the vessels had made an oral arrangement with a firm of ship brokers that the vessel upon the completion of the voyage upon which she was then engaged, should go to Antwerp, and there load a cargo in turn as one of a line of steamers and proceed by a particular route to the Black Sea. In consequence of repairs, necessitated by the collision, the ship was unable to fill this engagement, and by arrangement another smaller vessel was substituted for the injured vessel, the latter taking the place of the substituted vessel on a less remunerative route The owners of the injured vessel claimed to recover against the owners of the colliding vessel a sum representing (1) the additional profit (calculated on the profits actually made by the substituted vessel) which would have been earned but for the substitution ; (2) the loss of profit due to the difference in size between the two vessels ; (3) the loss of time in loading the injured vessel for the substituted route. But it was held by the majority of the Court of Appeal (Lindley and Bowen L.JJ.) that the evidence of the profits made by the substituted vessel was inadmissible, and that the damages must be assessed at such a sum as would represent what a vessel of the description of the injured vesssel might ordinarily and fairly be expected to earn, having regard to the fact that a contract had been entered into for her profitable employment. But Lord Esher, M.R., was of opinion that damages in respect of the loss of the agreement for the future hiring of the vessel were too remote to be recovered. All the members of the Court of Appeal were of opinion that the principle on which damages are to be assessed in such cases is the same in the Court of Admiralty as in a Court of Law, but they differ in its application. While Lord Esher, M.R., thought the damages occasioned by the loss of a contract for future employment were too remote, the other members of the Court (Lindley and Bowen, L.JJ.) were of the opinion that the existence of the contract for future service was an element which might properly be considered in estimating the damages.

LUNACY—SURPLUS OF INCOME—ALLOWANCE TO COLLATERAL RELATIONS OF LUNATIC.

In re Darling, 39 Chy. D., 208, was an application on behalf of the cousins of a lunatic to obtain an allowance out of his estate. The lunatic was 82 years of age, and his next of kin were ten cousins. Prior to his lunacy he had made small allowances to three of them, and after he became of unsound mind these allowances were continued by the Court. By his report the Master recommended a larger allowance should be made to these three cousins, and also that weekly allowances should be made to three others of the lunatic's cousins who were proved to be in very poor circumstances and to have difficulty in obtaining the necessaries of life, and it appeared that after payment of the proposed allowance there would still be a surplus income of £545 per annum. But on the application of the committee for the sanction of the Court to their allowance it was held by

the Court of Appeal (Cotton, Bowen & Fry, L.JJ.) that there being nothing to show that the lunatic would have done what the Court was asked to sanction, the mere fact that these collateral relatives were in humble circumstances and had difficulty in providing themselves with the necessaries of life, was not sufficient to warrant the Court in granting the application, which was therefore refused, and that it is not the duty of the Court to deal with a lunatic's estate benevolently or charitably, and applications for allowances to collateral relatives who have no legal claims upon the lunatic are to be discouraged.

COMPANY—ISSUE OF UNPAID SHARES AS FULLY PAID UP · ISSUE OF SHARES AT A DISCOUNT—ULTRA VIRES.

In re London Celluloid Co, 36 Chy. D. 190, an agreement was entered into between an English limited company and a French company that the French Company should render to the English company certain services, in consideration of which the English company agreed to transfer to the French company or their nominees 1000 shares in the English company, to be credited as fully paid up, with a proviso that before the shares were issued the English company should cause the agreement to be registered. The services were rendered and the 1000 shares issued, 800 to the French company and 200 to S, their nominee and a director of the French company. S subsequently transferred the shares to H, a director of the English company, who afterwards transferred 100 of them to B, another of the directors. The agreement between the two companies was, owing to the neglect of the English company's solicitor, never registered. The English company was ordered to be wound up, and the liquidator called upon B and H to pay calls on the 200 shares held by them, and it was held that he was not estopped from doing so, and that they were liable to pay the calls because they knew that nothing had been paid in cash on the shares, which distinguished the case from *Burkinshaw* v. *Nicholls*, 3 App. Case, 1004, and that the liquidator was not debarred from requiring B and H to pay the calls on the ground that the company, having made default in their agreement to register the agreement, was taking advantage of its own wrong by suing for calls which could not have been sued for if the agreement had been registered; because the right to sue for the calls did not arise from the failure to register the contract, but from the fact of taking the shares, the liability to pay for which shares in cash could only be taken away by a duly registered contract, and not by an agreement to register one. This decision of Kay, J., was affirmed by the Court of Appeal (Cotton, Bowen & Fry, L.JJ.). Kay, J., also held, following *In re Almada & Tirito Co.*, 38 Chy. D. 415 (noted *ante* vol. 24, p. 457), that as to another class of shares issued to B and H at a discount, that such issue was *ultra vires*, a limited company having no power to issue shares at a discount.

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

TRINITY TERM, 1888.

THE following is a *résumé* of the proceedings of Convocation during Trinity Term, 1888:—

The following gentlemen were called to the Bar during the above Term, *viz:*—

September 3rd.—Robert James McLaughlin, with honours and gold medal; William Mundell, with honours and silver medal; William Henry Williams, Alexander James Boyd, Stuart Alexander Henderson, Clifford Kemp, John Kyles, Herbert Edward Irwin, Henry Newbolt Roberts, William John McWhinney, John Barrett Davidson, Charles Albert Blanchet, Edward Herbert Johnston, John Clark, Arthur Wellington Burk, Orville Montrose Arnold, Joseph Hood Jacks, Herbert Hamilton Macrae, Arthur Arnold Mahaffy, Robert Osborne McCulloch, William Wallbridge Vickers.

September 4th.—Robert Hall Pringle.

September 8th.—Henry Blois Witton, Edward Henderson Ridley, Ralph Robb Bruce.

September 14th.—Stephen Wesley Burns.

The following gentlemen were granted Certificates of Fitness as Solicitors, *viz:*—

September 3rd.—W. H. Williams, E. W. H. Blake, C. A. Blanchet, W. W. Vickers, R. M. Dennistoun, W. A. F. Campbell, J. B. Davidson, A. MacNish, O. M. Arnold, E. H. Johnston, W. Lawson.

September 4th.—A. J. Boyd, C. Kemp, W. Mundell.

September 8th.—T. Browne, H. E. Irwin, J. Kyles, J. T. Doyle, J. L. Peters, E. H. Ridley.

September 14th.—M. Wright, A. W. Burk, S. W. Burns.

The following gentlemen passed the Second Intermediate Examination, *viz:*—

A. E. Lussier, with honours and first scholarship; and Messrs. G. Ross, B. N. Davis, T. W. R. McRae, F. M. Young, F. S. Mearns, A. Weir, J. McCullough, W. A. Thrasher, C. E. Lyons, E. L. Elwood, J. W. Roswell, A. B. McCallum, R. Segsworth, J. F. Keith, G. E. K. Cross, S. B. Arnold, H. D. Cowan, W. J. Hanna.

The following gentlemen passed the First Intermediate Examination, *viz:*—

W. Wright, with honours and first scholarship; A. G. McKay, with honours and second scholarship; J. A. Ferguson, with honours and third scholarship; and Messrs. A. J. Anderson, with honours; A. G. McLean, D. O'Brien, F. Pedley, W. E. L. Hunter, A. H. Northey, W. F. Smith, A. C. Boyce, S. E. Lindsey, R. C. Gillett, W. McBrady, G. T. Kerr, A. Crozier, H. L. Puxley, D.

Mackenzie, D. J. Hurteau, J. J. Drew, S. C. Macdonald, J. A. Mather, J. Armour, N. D. Mills, W. J. Kidd, H. Carpenter, W. H. Nesbitt, H. B. Travers.

The following gentlemen were admitted as Students-at-law and Articled Clerks, *viz:*—

Graduates—William Johnston, Philip Embury Ritchie, Alexander Andrew Smith, William Francis Robinson, Henry Anson Lavell, William Edward Burrett, George Francis Downes, John Graham Harkness, Franklin Arthur Hough, Newton Kent, William Alexander Lamport, William Arthur Leys, William Moore McKay, William Bernard Nicol, Edwin Arthur Pearson, Samuel Davis Schultz, William Llewellyn Wickett, Richard George Henry Perryn.

Matriculants—Richard John Sims, Samuel Verschoyle Blake, Hugh McConaghy.

Juniors—William Macfarlane, Leopold Trefusis Wells Williams, D'Arcy Rupert Tate, Edmund Foster Burritt, John Joseph Coughlin, Archibald Young Blain, Herbert David Smith, Thomas Joseph Anderson, Morley Punshon Vandervoort, Edwin Armitage Ead Halliwell, Frederick Moira Canniff, Henry Marshall Graydon, Nassau Brown Eagen, Columbus Calverley, Edward McMartin, Hugh Paterson Innes, John Troughton Thompson, jr., Dugald Campbell, Neil Hugh McIntosh, William Edgar Foster, Boulton Ramsay Kean, Alfred Ernest Fripp, Clarence George Powell.

Monday, 3rd September.

Convocation met.

Present—Messrs. Beaty, S. H. Blake, Foy, Fraser, Hoskin, Irving, Kerr, Lash, Maclennan, Morris, Moss, Shepley.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

The Report of the Examiners on the Examinations for Honours was read and referred to Messrs. Moss, Morris and Shepley as a Special Committee for report.

Mr. Shepley presented the Petition of Mr. A. E. K. Greer.

Ordered, that the prayer of the Petition be granted in so far that his Certificate of Fitness do issue, but that notice for call be given by Mr. Greer for Michaelmas Term, and that his examination be then allowed..

The Petition of Mr. H. M. East was then read, suggesting that there was a miscount at the examination for call, and praying that a committee be appointed to examine the returns.

Ordered, that the same do stand until to-morrow.

The Petition of Mr. W. Mundell was read, and it was ordered that he be allowed an oral examination, and that the examiners be requested to hold such examination and report to Convocation.

The Petitions of Messrs. A. W. Burk and C. E. Lyons were read and referred to the Legal Education Committee for report.

The death of Mr. S. J. Vankoughnet, Q.C., Reporter of the Queen's Bench Division, was announced by Mr. Maclennan, and it was ordered that the usual advertisement for a candidate to fill the vacancy be issued by the Secretary, requir-

ing that all applications be in his hands not later than Thursday, 13th instant, and that the usual notice be given to every Bencher for the 14th September.

The Special Committee on Honours and Scholarships reported :—

(1.) That Robert James McLaughlin is entitled to be called with honours and to receive a gold medal.

(2.) That Messrs. W. Wright, A. G. McKay, J. A. Ferguson, A. J. Anderson and A. G. McLean passed the First Intermediate Examination with honours, and that Mr. Wright is entitled to a Scholarship of one hundred dollars, Mr. McKay to a Scholarship of sixty dollars, and Mr. Ferguson to a Scholarship of forty dollars.

(3) That Mr. A. E. Lussier passed the Second Intermediate Examination with honours, and is entitled to a Scholarship of one hundred dollars.

(4) That it appears that Mr. William Mundell was awarded marks sufficient to entitle him to be called with honours and to receive the silver medal of the Society, but it appears from the Records that Mr. Mundell was not in due course, but that on special application he had been awarded honours and scholarships in connection with his First and Second Intermediate Examinations, but the allowance thereof was not to prejudice the position in future examinations of other candidates with whom he might come into competition.

(5) It also appears that there is no other competitor entitled to the silver medal, and the Committee recommend that, notwithstanding the rules, Mr. Mundell be awarded honours and the silver medal.

The report was considered, adopted and ordered accordingly, and it was further ordered that Mr. Mundell be awarded honours and the silver medal in pursuance of the recommendation in the report.

Tuesday, 4th September.

Convocation met.

Present—Messrs. Beaty, Bell, S. H. Blake, Britton, Cameron, Foy, Fraser, Hardy, Hoskin, Hudspeth, Irving, Kerr, Lash, McCarthy, McMichael, Maclennan, Morris, Moss, Murray, Osler, Robinson, Shepley.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and confirmed.

The Report of the Examiners on the oral examination of Mr. William Mundell, directed by Convocation yesterday, was read, and the Secretary having reported that his papers were complete and that he was entitled to a Certificate of Fitness,

Ordered, that his Certificate be granted.

The Chairman announced that under the authority of rule 3, section 14, of the rules of the Society, he had appointed Mr. E. B. Brown, Reporter of the Q. B. Division, to act until Convocation should fill the present vacancy in that position.

Upon consideration of the report of the Discipline Committee in the matter of Mr. J. B. Hands, in accordance with the order of Convocation of the 26th June

last, it was ordered that Mr. J. B. Hands be called upon to show cause why the Report should not be acted upon by Convocation.

Mr. J. B. Hands, accompanied by his Counsel, Mr. Fullerton, being in attendance, they were then admitted to Convocation. Mr. Fullerton stated that he appeared as Counsel for Mr. Hands and was prepared to show cause on his behalf against Convocation acting upon the report of the Committee on his case, and he was then heard.

At the conclusion of Mr. Fullerton's remarks Mr. Hands was asked whether he desired to add to the observations made by Mr. Fullerton on his behalf.

Not making any further statement, he and his Counsel withdrew.

The consideration of the Report of the Discipline Committee was then proceeded with, and the following resolution was moved, viz:—

On hearing read the report of the Discipline Committee, and having considered the evidence adduced, and Mr. Hands having been duly called upon to show cause why the report of said Committee should not be acted upon by Convocation, and Mr. Hands having thereupon attended before Convocation upon hearing what was alleged by Mr. Hands by himself and through his Counsel, an it having been found after due enquiry that John Baldwin Hands has been guilty of conduct unbecoming a barrister or solicitor, it is resolved that the report of the said Committee be adopted, and it is further resolved that John Baldwin Hands is unworthy to practice as a solicitor, and that he be disbarred as a barrister.

There then being present twenty-two members of Convocation, the said resolution was passed unanimously.

The Secretary was directed to send Mr. J. B. Hands a copy of the resolution above adopted.

Mr. Moss gave notice that at the next meeting of Convocation he will introduce a rule to amend sub-section 9 of section 6 of the rules by adding thereto, "Provided he has obtained at least 29 per cent. of the marks obtainable on the paper in each subject."

Saturday, 8th September.

Convocation met.

Present—Sir Adam Wilson and Messrs. Cameron, Irving, Mackelcan, Maclennan, Meredith and Moss.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and confirmed.

Mr. Moss, from the Legal Education Committee, presented the report of that Committee.

In the case of H. B. Witton, recommending that he re-article himself for the requisite period of twenty-one days, and that his examination do stand for the consideration of Convocation, with the favorable recommendation of the Committee.

The Committee further report as to Mr. Witton's affidavit made on the 17th August that he had served until the 27th August, which he has explained to the

satisfaction of the Committee, and the Committee think, under the circumstances, his action be excused.

The report was received and adopted.

In the case of Mr. A. B. Thompson, the Committee recommend that he re-article himself for a sufficient time to cover the interval between the date of his original articles and the date of the presentation of his diploma to the Committee, and the examination he has passed be favorably considered next Term.

The report was received and adopted.

In the case of C. E. Lyons, the Committee report that he passed the Second Intermediate Examination sooner than he should have done, namely, six months after his First Intermediate, and that his explanation is that sickness was the cause.

The Committee report that there is no power under the Statute to grant the relief asked, and recommend that leave be given him to present himself next Term for the Second Intermediate.

Mr. Maclennan brought up the notice given by Mr. Hands by way of appeal, which notice had fallen through, but would be renewed.

Mr. Maclennan suggested the appointment of Counsel.

Ordered, that the Solicitor be directed to retain Mr. Reeve, Q.C., as Counsel.

The report of the Library Improvement Committee was read.

Ordered, that further consideration of the report be deferred until the second day of next Term, and that the report be printed and distributed to Members of Convocation with notice when the same is to be considered, and that the Committee be allowed to place six book racks on the north side of the Library, opposite those on the south side, at a cost not to exceed five hundred dollars.

Pursuant to notice, Mr. Moss, seconded by Mr. Meredith, moved the following rule to amend rule 9 of section 6:—

"That rule 9 of section 6 of the rules be amended by adding thereto, "Provided he has obtained at least 29 per cent. of the marks obtainable on the paper in each subject."

The rule was read a first and second time.

Ordered, for a third reading on the next meeting day of Term.

The Secretary read the report of the examination on Second Intermediate Honours Examination, which should have been taken in Easter Term last, but was ordered by Convocation to be taken this Term.

The report was referred to a Special Committee composed of Messrs. Moss, Maclennan and Meredith, for consideration and report.

The Secretary read the Report of the Examiners on J. I. Poole's oral examination in respect of his Second Intermediate Examination.

Ordered, that he be allowed his Second Intermediate Examination, as of Easter Term, 1888.

The Secretary was directed to reply to the letter of the Reporters applying for the use of the western annex to the Library, that the room was not vacant and was required for Library purposes, and that it is not desirable that the Reporters should have keys to the Library.

Mr. J. A. Macdonell's letter to Mr. Read, the Solicitor of the Society, was read, and the Secretary was directed to write the Solicitor that he should deliver the statement of defence in the ordinary course.

The letter of J. B. Hands of 5th September was read, and the Secretary was directed to deliver to him the papers for which he applied, and which he has not already received.

The Special Committee on the Second Intermediate Honour Examination of Easter Term, 1888, presented their report.

The report was received and ordered to be considered at next meeting.

Friday, 14th September.

Convocation met.

Present—Sir Alexander Campbell, and Messrs. Beaty, S. H. Blake, Foy, Guthrie, Hardy, Hoskin, Lash, McCarthy, Martin, Meredith, Morris, Murray, Osler, Smith.

In the absence of the Treasurer, Mr. Maclennan was appointed Chairman.

The minutes of last meeting were read and approved.

Mr. Lash from the Legal Education Committee reported on the cases of M. Wright and A. W. Burk, recommending that their Certificates of Fitness be granted.

The report was received, considered and adopted.

Ordered, that Messrs. Wright and Burk do receive Certificates of Fitness.

Mr. Lash also reported in the case of F. R. Blewett, recommending that his petition for allowance of First Intermediate Examination be not granted.

The report was considered and adopted.

Mr. McCarthy from the Reporting Committee presented the report of that Committee, which was received and ordered to be considered immediately.

The report was adopted.

Ordered, that Mr. E. B. Brown be paid the sum of twenty-six dollars, being balance due him for doing Mr. Vankoughnet's work, out of the two hundred and fifty dollars voted by Convocation for that purpose.

Ordered that Mr. Vankoughnet's executors be paid his salary up to the 30th June, and that Mr. Brown receive the salary of the office after that date.

Mr. Osler gave notice of a motion to amend and alter section 14 of the rules, so far as the same relates to the office and salary of the Reporter for the Court of Appeal, to provide for the reporting of cases in the Court of Appeal in any way which may seem best to Convocation, and to alter and amend the rules accordingly.

The Petition of S. W. Burns, whose time expires to-morrow, to have service allowed and Certificate granted, was read.

Ordered, that the prayer of the Petition be granted on condition that his service and papers are proved to the satisfaction of the Secretary to be in all other respects regular.

The Petition of H. M. East to have his examination for call reconsidered, on the ground of some mistake or miscalculation, was read.

Mr. Osler, seconded by Mr. S. H. Blake, moved that Convocation having perused the questions and the answers of the petitioner thereto, refer the Petition to the Legal Education Committee to consider the matters complained of and to report to Convocation.

A letter from Mr. Johnston, Deputy Attorney-General, enclosing a letter from Mr. L. H. Dickson, was read.

Ordered that no action be taken thereon.

The Report of the Special Committee on Honours and Scholarships in connection with the Second Intermediate Examination of Easter Term last, was received, considered and adopted.

Ordered that the Scholarships be paid in accordance with the Report of the Committee.

A telegram from Mr. S. B. Burdet, referring to some correspondence in connection with the Second Intermediate Examination of C. E. Lyons, was read.

Ordered unanimously that the former resolution in this case be reconsidered on account of the correspondence now produced for the first time between Mr. Lyons and the Secretary, such reconsideration to be postponed until next Term.

Mr. Meredith gave notice that at the next meeting of Convocation he will move to amend the rules relating to Scholarships so as to provide that where a candidate for honours is both a student-at-law and an articled clerk, he shall be deemed to be in his regular year, reckoning from the period when he became a student-at-law or articled clerk, whichever shall be the earlier period.

Mr. E. B. Brown was elected Reporter to the Queen's Bench Division in the place of Mr. S. J. Vankoughnet, Q.C., deceased.

Ordered that Mr. Brown be appointed to the office.

The rule to amend rule 9 of section 6 of the Consolidated Rules was read a third time and passed.

Convocation adjourned.

J. K. KERR, *Chairman Committee on Journals.*

DIARY FOR JANUARY.

1. Tues....*New Year's Day.*
2. Wed....Toronto Assizes, Civil side. (Rose, J.) Hamilton Assizes. (Falconbridge, J.)
3. Thur.....Lord Eldon died 1838, aged 87.
4. Fri.....Chief Justice Moss died at Nice, 1881.
5. Sat.....Last day for notices for Primary Exam.
6. Sun.....*Epiphany—Christmas Vacation ends.*
8. Tues....Court of Appeal Sittings. London Assizes. (McMahon, J.)
12. Sat.....Sir Charles Bagot, G. G., 1842.
13. Sun.....*First Sunday after Epiphany.*
14. Mon....County Court Sittings for motions begin.
15. Tues....Primary Examination.
17. Thur....Admission of Graduates and Matriculants.
19. Sat.....Last day for filing papers and fees. County Court Sittings for motions end. Lord Langdale appointed M.R., 1836.
20. Sun.....*Second Sunday after Epiphany.*
22. Tues....First Intermediate Exam. Toronto Assizes, Criminal side. (Rose, J.) Lord Bacon born, 1561.
24. Thur....Second Intermediate Examination.
27. Sun.....*Third Sunday after Epiphany.*
29. Tues....Solicitors' Examination.
30. Wed....Barristers' Examination.

Reports.

ONTARIO.

THIRD DIVISION COURT, COUNTY OF ELGIN.

[Reported for the CANADA LAW JOURNAL.]

RAYMOND *v.* CLOSE.

Landlord and Tenants' Act—Distress for rent—Sale of sewing-machine to tenant's wife—Property of vendor is not to pass until paid for—Not exempt from seizure—Tender of rent—Possession.

The plaintiff sold a sewing-machine to the wife of the defendant's tenant, which was to become the property of the tenant's wife when it was fully paid for. In the meantime it was to remain the property of the plaintiff. The defendant seized and sold it for arrears of rent due to him. The plaintiff brought this action to recover the value of the machine as for an illegal seizure and sale.

Held, that it was liable to seizure, and that the plaintiff was not entitled to recover.

[HUGHES, Co. J.—St. Thomas, Dec. 26, 1888.

The defendant is the proprietor of a house and premises in the Township of Yarmouth—demised to one Haines, on a monthly tenancy. There was rent in arrear, unpaid. In the house was a clock and a sewing-machine. The last named article had been sold by the plaintiff to the wife of the tenant upon what is called the lien-holding system. The tenancy was created after the first day of October, 1887, that is to say on the 4th of July last, at a rental of three dollars per month, payable in advance. There was no tender of the rent to the landlord or bailiff, either before or after the seizure.

The machine was taken by the defendant's bailiff to New Sarum and sold, and the plaintiff brought this action to recover its value as for an illegal seizure and sale.

Macbeth, counsel for the plaintiff, contended that the goods were the plaintiff's and protected from the distress: first, by the provision of the 27th section of the Landlord and Tenants' Act, because a sewing machine cannot be seized, but is exempt under the Executions Act, which has been made to apply to a distress for rent; and second, because by the provision of the 28th section of the Landlord and Tenants' Act, a landlord cannot distrain for rent on goods and chattels, the property of any person except the tenant or person who is liable for the rent, although this machine was found on the premises; and third, that as the machine was sold to the wife of the tenant, it was not subject to a distress:—That although it was in the house of the tenant at the time of the distress, it was not there under a contract for its purchase, made with the tenant but with his wife; nor was it in the possesssion of the tenant on the premises within the meaning of the exceptions referred to in the 28th section. And that because the property was not claimed by the wife of the tenant so as to justify its seizure, it was wholly restricted from the distress. He also contended that because the property in the machine had not passed and was not to pass until it was paid for, it was exempt from seizure under the general restrictions of the 28th section.

Macbeth for plaintiff.

McCrimmon for defendant.

HUGHES, Co. J.—Considering the state of the law as it affects the relation of landlord and tenant, and the right of the former to distrain for rent, and the very few exemptions from distress which existed before the passing of the Ontario Statute 50. Vict. c. 23, and that the exemptions which had been created by statute at the time of this distress were evidently intended for the benefit of poor tenants, (who had been frequently oppressed and stripped of everything by their landlords) and not for the protection of wealthy

corporations or merchants or manufacturers, who sell their wares and goods on the instalment system at enormous profits, retaining a lien for the price, and, considering that the 28th section of the Landlord and Tenants Act, explicitly withholds any application of its restrictions in favor of persons claiming title by way of mortgage or otherwise, or to goods on the premises in possession of the tenant under a contract for purchase, I think, after the mature consideration that I have given to the subject, that the plaintiff is not entitled to recover, and that my judgment should be for the defendant.

It is claimed by the plaintiff here that because a sewing-machine is exempted from seizure, under execution for debt, that by the 27th section of the Landlord and Tenants Act, it was not liable to seizure under this distress by this defendant for rent. Before the tenant could claim the exemption so as to enable this plaintiff to avail himself of that ground, it was necessary that the tenant, (who was then in default on account of non-payment of rent) should have given up possession of the premises forthwith, or been ready to do so; which means that it was to be an unconditional offer, such as is required in order to constitute a good and legal tender of any kind, whether in money or material. The offer here made by the tenant was restricted by a condition which he attached to it but which he had no right to impose. The evidence was "I wanted Mr. Close to bring the things back and I would pay the rent." He did not say "he would not bring them back—I could have got the money etc." This bears upon a continuance of the tenancy, by payment, or promise of payment of rent, rather than upon an offer unconditionally made, to give up possession of the premises, so as to create an exemption from seizure. A surrender of possession would have worked a determination of the tenancy.

I find, as a matter of fact, that there was no tender of rent, nor any actual offer to give up possession of the premises, but rather what I take to have been a menace on the part of the tenant, that he would make the defendant "bring the things back," or that the landlord would have to do so. Unless there was, as I said before, an actual and unconditional offer on the part of the tenant, to give up possession of the premises forthwith or an expressed readiness to do so, or a giving up of such possession forthwith, the tenant could not, nor can this plaintiff for want of such, claim the benefit of the exemption to which the tenant would have been entitled under the Act, had he acted properly.

The tenant being in default for non-payment of rent, not having given up possession of the premises, forthwith, and not being ready and not having offered to do so, could not claim the benefit of the exemption to which he would otherwise have been entitled, and the landlord, in order to seize the exempted goods, after that default, had a right, either before or at the time of the seizure, to serve the tenant with the notice, which the defendant did serve, to inform the tenant of what amount was claimed for rent, and to notify him that in default of payment, if he gave up possession of the premises after service of the notice, he would be entitled to claim the exemption; but that as he neither paid the rent nor gave up possession, his goods and chattels were liable to the seizure and to be sold to pay the rent and costs.

The second question involved here is not at all affected by the Married Woman's Property Act, but, exclusively by the Landlord and Tenants' Act, under the provisions of which latter I find no decision pertinent to it. Although, under the law, as it stands now, a married woman may hold property, and have possession, in her own right, of chattels remaining in the mixed possession of both husband and wife, on the premises which they jointly occupy, which are no longer as formerly, in the possession of the husband, still that chattels upon the premises in which the husband and wife reside, may be in the possession of either, is equally consistent with the common occupation. (See Lush on Husband and Wife, 206, 207.)

The more restricted right of a landlord to distrain for rent is clearly and broadly defined by the 28th section of the statute; so that the goods and chattels found on the premises demised, which belong to any person other than the tenant or person who is liable for the rent, are not to be so distrained. But the restriction does not apply to goods on the premises in the possession of the tenant, under a contract for purchase or by which he

may or is to become the owner upon performance of any condition, and it is specifically provided that the restriction is not to apply where the property is claimed by the wife of the tenant, etc.

It is quite true that the provisional sale of this sewing-machine was made to the wife of the tenant, and not to him, and that when it was seized for the distress, it was not "claimed" by the wife, but it was there in the house in the "possession of the tenant under a contract for purchase" of which the wife was to become the owner upon payment of the purchase money, and it was, in my judgment, as much the subject of a distress for rent under the circumstances, as it was before the passing of the statute 50 Vict. c. 23, or the R. S. O., 1887, c. 143.

It mattered not whether the sale was to the tenant or to his wife, because the exemption only applies to the cases specially restricted by the terms of the statute; anything not so exempted would be subject to the state of the law as it stood before the statute as to exemptions for such seizures, was passed. It is specifically provided by the statute that the restriction is not to apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the tenant or by any other relative of his, in case such other relative lives on the premises as a member of the tenant's family; so that neither the plaintiff who made the contract for the purchase of the machine with the tenant's wife, by which she was to become the owner thereof, nor the wife herself could claim any exemption under the 28th section, because the plaintiff could only claim the machine through any exemption to which the tenant was entitled, she had no such right whatever.

The wife of the tenant had no property in the machine, so that she could not claim it as hers; but whether she could or not, the only question is whether or not it was, in a proper sense, in the possession of the tenant, her husband.

I regard the word "possession" in the 28th section, as intended in its popular and not strict legal sense, because if there were a possession in the wife the exemption could not be claimed by her, and much less for her, even if she were the absolute owner of the machine. An action could have been maintained by the tenant against any wrong-doer who might take away the machine out of the house whilst he was in the occupation and possession of the premises, without shewing that he had any property in the machine, (3 Salk. 9) because there is a presumption of possession from the fact of the machine being upon the premises. I also consider that the object of the exceptions to the wide provisions set forth in the introductory part of the 28th section, was to protect landlords against being induced to admit persons as tenants of their houses and lands, who are only the apparent owners of goods and chattels in their possession, and which really belong to someone else, and to make persons who sell their wares to impecunious persons, under contracts for purchase, more cautious as to whom they trust the possession of them. I think, therefore, that this plaintiff cannot avail himself of any advantage that he might expect to derive from this point of supposed weakness in the defendant's right to distrain.

I find that reasonable opportunity was given by the bailiff for the tenant to determine what he would do, and that he would do neither.

I therefore find and give judgment for the defendant, because the tenant neither paid nor tendered the rent nor gave up possession of the premises, and the sewing-machine was therefore liable to seizure and sale to pay the rent in arrear, just the same as it would have been before the passing of the statute to which I have referred.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

[Dec. 14, 1888.

PURDOM *v.* BAECHLER.

Partnership—Dissolution—Debt of retiring partner—Mortgage of partnership property for—Liability of remaining partner—Accommodation note—Collateral security—Voluntary payment of.

N. borrowed an accommodation note from P. and gave it as security for part of the purchase of a mill. N. and B. afterwards went into partnership and gave a mortgage on partnership property for the debt partly

secured by said note which remained in the hands of the mortgagees. The partnership was eventually dissolved, B. assuming the payment of the debts, including the mortgage. P. paid the note and the amount was credited on the mortgage. In an action by P. to recover the amount so paid from B., the latter denied all knowledge of the note.

Held, reversing the judgment of Court of Appeal, RITCHIE, C.J., and FOURNIER, J., dissenting, that there was evidence to show that B. had, in settling the partnership accounts, agreed to pay the amount represented by the note, but if that was not so, the payment of the note by P. could not be regarded as a voluntary payment and he could recover the amount from B.

Appeal allowed with costs.

Park and *Purdom*, for appellants.

Idington and *Palmer*, for respondents.

[Dec. 14, 1888.

PALMER *v.* WALLBRIDGE.

Mining lease—Construction of—Reservation of rent—Conditional on quantity of ore raised—Dead or sleeping rent—Right to terminate lease.

In a lease of mining lands the reddendum was as follows: "Yielding and paying therefor unto the party of the first part one dollar per gross ton of the said iron ore for every ton mined and raised from the said lands and mine, payable quarterly on" (specifying the days.)

The lessees covenanted as follows: "That they will dig up and mine and carry away in each and every year during the said term a quantity of not less than 2000 tons of such stone or iron ore for the first year, and a quantity of not less than 5000 tons a year in every subsequent year of the said term, and that they will pay quarterly the sum of one dollar per ton as aforesaid for the quantity agreed to be taken during each year for the term aforesaid." There was a proviso in the lease that in case ore should not be found or obtained in reasonable or paying quantities the lessee could terminate the lease, and also a provision that if the rent paid in any quarter should exceed the quantity of ore raised such excess should be applied towards payment of the first quarter thereafter in which more than the said quantity should be taken.

Held, affirming the judgment of the Court of Appeal, RITCHIE, C.J., and FOURNIER, J., dissenting, that the proper construction of these provisions was to make the lessees liable to pay the rent reserved in any event, and not having exercised the right of terminating the lease, they were not relieved from the rent by the fact of ore not being found in reasonable or paying quantities.

Appeal dismissed with costs.

Bell and *Biggar*, for appellant.

F. T. Wallbridge, for respondent.

[Dec. 14, 1888.

MERCHANTS' BANK OF CANADA *v.* MCKAY.

Surety—Bank customer—Course of banking business—Renewals of notes—Forged renewals—Negligence of bank—Relief of surety.

M became surety to a bank to secure a named indebtedness of a firm dealing with the bank and also future advances. By the terms of his agreement of suretyship M was liable for all promissory notes, etc., of the customer, of a certain date, and "all renewals, substitutions and alterations thereof." The renewals of certain of the notes proved to be forgeries. In a suit by the bank against the surety:

Held, per RITCHIE, C.J., FOURNIER and TASCHEREAU, JJ., affirming judgment of the Court of Appeal, that the bank having parted with the good paper of the customer to which the surety had a right to look for security, and accepted therefor forged and worthless paper, the surety was, to the extent of such forged paper, released from his liability to indemnify the bank.

Held, per STRONG, J., that as the evidence showed the bank to have acted without negligence, the surety was not so relieved.

Per GWYNNE, J., that a reference having been ordered to take an account of the amount of the paper said to be forged, the consideration of the surety's liability should be postponed until a report was made on such reference.

Appeal dismissed with costs.

Smith, *Rae* and *Greer*, for appellants.

Macdonald, *Merritt* and *Shepley*, for respondents.

[Dec. 14, 1888.

HALDIMAND ELECTION CASE.

Controverted elections act—Wilfully inducing voter to take a false oath—Farmer's son—Loss of qualification—R.S.C. c. 9 ss. 91, 92 and 93.

At the trial of an election petition alleging that F. H., an agent of the respondent, did, at a polling station, induce one T. N. to take a false oath at the poll and to vote at said election though not qualified to do so, it was proved that F. H. represented the respondent as scrutineer at the poll under a wrirten authority, and that J. N., who was on the list qualified as a farmer's son, offered himself to vote at the polling place in that capacity. His vote being objected to and being requested to take the farmer's son's oath "T." he hesitated, and then F. H. told him to take the oath and that his vote was perfectly good. The farmer's son's oath "T." was then read to him by the returning officer and he took it and voted. As a matter of fact T. N.'s father had died before the final revision of the list, and at the time of the election T.N. was in occupation of the land as owner.

Held, that for the purposes of the election F. H. was the respondent's agent, and that he was guilty of a wilful offence against s. 90 of c. 8, 49 Vict.,and the election was declared void under section 93, (STRONG and GWYNNE, JJ., dissenting.)

Per STRONG J.—That at the scrutiny of the votes before the trial judge the petitioner is entitled to prove that voters whose names were on the list as farmers' sons were not qualified as such at the time of the election.

Appeal allowed with costs.

Aylesworth and *Coulter*, for appellant.

McCarthy, Q.C., for respondents.

[Dec. 14, 1888.

GRINNELL *v.* THE QUEEN.

Customs duties—Importation of article composed of parts—Rate of duty—Duty on completed article—Subsequent legislation.

G, manufacturer of a device made of brass and called an automatic sprinkler, wishing to import it into Canada, interviewed the appraiser of hardware at Montreal, exhibited to him the sprinkler and explained its construction and use, and was told that it should pay duty as a manufacture of brass. G. imported a number of sprinklers in parts and paid the duty as directed by the appraiser. After three shipments had been made the sprinklers and tools for making it were seized by the customs officials, and an information laid against G., under sections 153 and 155 of the Customs Act of 1883, for smuggling, making false invoices, undervaluation, and knowingly keeping and selling goods illegally imported. There was no provision in the Act imposing a duty on parts of articles imported.

Held, reversing the judgment of the Exchequer Court of Canada, that the customs law not imposing a duty on parts of a completed machine imported as this was,and the importer having acted in all good faith and took all possible steps to ascertain his liability to the customs authorities, there was no foundation for the charges laid in the information, which should be set aside and the claimant's property restored to him.

Held also, that the passing of an Act subsequent to the proceedings against G., providing for the imposition of duties on such parts of completed articles, was a legislative declaration that such duty was not previously provided for.

Appeal allowed with costs.

D. Girouard, for claimant.

O'Connor and *Hogg*, for the Crown.

[Dec. 15, 1888.

BARNARD *v.* MOLSON.

Opposition en sous ordre—Moneys deposited in hands of prothonotary—C. C. P. Art. 753.

Held, per RITCHIE, C.J. and STRONG and TASCHEREAU, JJ., that where moneys have been deposited by a garnishee in the hands of a prothonotary, and the attachment of such moneys is subsequently quashed by the final iudgment of the court, there being no longer any moneys subject to a distribution or collocation, such moneys cannot be claimed by an opposition *en sous ordre*: the claimant's recourse in such a case is by *saisie arret*, founded upon the affidavit and formalities required for that proceeding.

FOURNIER and GWYNNE, JJ., dissenting on the ground that as the moneys were still subject to the control of the court at the time

the opposition *en sous ordre* was filed, such opposition was not too late.

Appeal dismissed with costs.

Begue and *Lacoste*, for appellant.

Laflamme, Q.C., and *Robertson*, Q.C., for respondent.

[Dec. 15, 1888.

ALLEN *v.* THE MERCHANTS' MARINE INS. CO.

Marine insurance—Conditions of policy—Validity of—Art. 2184 C.C.

A condition in a marine policy that all claims under the policy should be void unless prosecuted within one year from date of loss is a valid condition and not contrary to Art 2184 C.C., and all claims under such policy will be barred if not sued on within the said time.

Per TASCHEREAU, J.—The debtor cannot stipulate to enlarge the delay to prescribe, but the creditor may stipulate to enlarge that delay.

Appeal dismissed with costs.

[Dec. 15, 1888.

BRISEBOIS *v.* THE QUEEN.

Reserved crown case—Ch. 174, secs. 246 and 259 R.S.O.—Construction of.

B. having been found guilty of feloniously having administered poison with intent to murder moved to arrest the judgment on the ground that one of the jurors who tried the case had not been returned as such. The general panel of jurors contained the names of Joseph Lamoureux and of Moise Lamoureux. The special panel for the term of the court at which the prisoner was tried contained the name of Joseph Lamoureux. The sherriff served Joseph Lamoureux's summons on Moise Lamoureux and returned Joseph Lamoureux as the party summoned. Moise Lamoureux appeared in court and answered to the name of Joseph Lamoureux and was sworn as a juror without challenge when B was tried. On a case reserved it was:

Held, affirming the judgment of the Court of Queen's Bench, that s. 246 c. 174 R.S.C. clearly covered the irregularity complained of, STRONG and FOURNIER JJ., dissenting.

Held, also, per RITCHIE C.J. and TASCHEREAU and GWYNNE JJ., that the point should not have been reserved by the judge at the trial, it not being a question arising at the trial within the meaning of s. 259 c. 174 R.S.C.

Appeal dismissed with costs.

Leduc, for appellants.

Mathieu and *Garmully*, for the crown.

[Dec. 15, 1888.

PROOPER *v.* THE QUEEN.

Criminal law—Trial for felony—Jury attending church—Remarks of clergyman—Witnesses—Medical expert—Admissibility of evidence of.

During the progress of a trial for felony the jury attended church in charge of a constable, and at the close of the service the clergyman directly addressed them, remarking on the case of one Millman who had been executed for murder in P.E.I., and told them that if they had the slightest doubt of the guilt of the prisoner they were trying they should temper justice with equity. The prisoner was convicted.

Held, affirming the judgment of the Court of Crown cases reserved for Nova Scotia, that although the remarks of the clergyman were highly improper, it could not be said that the jury were influenced by them so as to affect their verdict.

A witness on a trial for murder by shooting, called as a medical expert, stated to the crown prosecutor that "there were indicia in medical science by which it could be said at what distance from the human body the gun was fired." This was objected to, but the witness was not cross-examined as to the grounds of his statement. He then described what he found on examining the body of the murdered man, and stated the maximum and minimum distances at which the shot must have been fired.

Held, STRONG and FOURNIER, JJ., dissenting, that the opening statement of the witness established his right to speak as a medical expert, and not having been shown by cross-examination, or by other medical evidence,

that his statement was untrue, his evidence was properly admitted.

Appeal dismissed with costs.

Henry, Q.C., and *Harrington*, Q.C., for appellant.

J. W. Longley, Q.C., for respondent.

Man.] [Dec. 14, 1888.

CAMERON *v.* TAIT.

Principal and agent—Authority of agent—Excess of ratification by principal—Agent for two principals—Contract by.

M., a machine broker at Winnipeg, was appointed, by authority in writing, agent for P. T. & Co., manufacturers of mill machinery at Port Perry, to sell machinery in certain districts. M. was also agent for the D. Engine Co., manufacturers of steam engines and steam machinery at Toronto.

C. T. & Co., lumber manufacturers at Rat Portage, ordered from M. a saw mill and machinery complete, of a specified cutting capacity, for which they agreed to pay a fixed price. M. agreed by letter to furnish such mill and machinery at the price named. M. procured the mill and machinery from P. T. & Co., and the power for working it from the D. Engine Co. and delivered them to C. & M. at Rat Portage. It proved, however, that the mill would not cut the quantity of lumber agreed on, and P., T. & Co. undertook to put in new machinery, but on C. & M. refusing to make certain payments before delivery of the same, it was not put in. In an action by C. & M. against P., T. & Co. for breach of warranty:

Held, affirming the judgment of the court below, RITCHIE, C.J., and FOURNIER, J., dissenting, that the contract by M for the sale of both the mill and power as a single transaction and for a lump sum was in excess of his authority as agent of P., T. & Co., and the contract was, therefore, one with M. personally, and the judgment of nonsuit in the court below was right.

Held also, that unless both P., T. & Co. and the D. Engine Co. joined in adopting the contract and in warranting each other's goods, as well as their own, there could be no ratification of the sale by either.

Appeal dismissed with costs.

Aikins, Culver and Hamilton, for appellants.

J. W. E. Darby, for respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[June 29, 1888.

FOLLET *v.* TORONTO STREET RAILWAY CO.

Negligence—Damaged by street car—Contributory negligence—Accident by carelessness of plaintiff.

While a car of the defendant's in charge of another servant of the company, the driver having temporarily gone to the rear of the car, was proceeding westerly at a slow rate along a street in the city of T., on which they had the right of way, the plaintiff, whose carriage was waiting at the kerb stone, without observing the near approach of the car, got into and drove her carriage for a short distance in the same direction as the car, when she suddenly turned north intending to cross, but in such a close proximity to the car, that, but for the prompt action of the driver in charge in turning his horse off the track, his horse would have collided with the plaintiff's carriage; as it was, notwithstanding the break was applied to the car the whiffletree struck the wheel of the carriage, when it was upset, and the plaintiff thrown to the ground and her leg was fractured.

In an action for damages, the jury found in favour of the plaintiff, which verdict the Divisional Court refused to disturb. On appeal, this Court [OSLER J. A., dissenting] being of opinion that there was no evidence of negligence on the part of the defendants, reversed the judgment of the C. P. D., and dismissed the action, with costs.

Osler, Q.C., and *Shepley*, for the appellants.

Robinson, Q.C., and *Fullerton*, for the respondents.

[Nov. 14, 1888.

SHEARD *v.* LAIRD.

Deed obtained by threats of legal proceedings—Undue influence.

The defendant had become liable as accomodation indorser for the husband of one of the plaintiffs, who, with his wife, became makers of a joint note to defendant as security, and which it was agreed should be paid out of the proceeds of certain lands that had been previously conveyed by the husband to his wife. Instead of doing so, however, the

husband sold the lands and absconded, leaving his wife behind.

The defendant, on learning this, went to the wife in a state of excitement, threatened to aid in proceedings criminal as well as civil unless he obtained security, and urged her to procure her mother to give security on a piece of land belonging to the latter.

This, the mother, after persuasion by the daughter, agreed to give, the defendant advising that plaintiff's legal adviser should not be consulted, and on the evening of the following day, a deed absolute in form, was executed by both the mother and daughter, the latter having dower in the land, in favor of the defeudant, who, at the mother's request gave a separate memorandum of defeazance. There had been no direct commuication between the defendant and the mother; nor were there any threats made or undue influence apparent at the time of execution of the deed, both grantors being aware that they were giving security.

In an action impeaching this deed as having been obtained by threats and undue influence, the trial judge [ARMOUR, C. J.] dismissed the action with costs, which judgment was set aside by the Divisional Court of the Common Pleas Division.

On appeal to this Court, the judgment of the C. P. D. was reversed, and the judgment of this trial Judge restored with costs.

W. H. Bowlby, for the appellant.

C. A. Durand, for respondents.

[March 6, 1888.

RYAN *v.* COOLEY.

Will, construction of—Vested interest—Contingent interest—Maintenance.

The testator made a residuary devise of real estate to his executors, in trust for his four children, "until they, or the survivor or survivors of them, shall have attained the age of twenty-one years, said real estate to be divided amongst the said four children, share and share alike, and in case any of them shall have died, leaving issue, the said issue shall take the share which otherwise would have gone to his, her or their parent." The will also directed the said four children should be maintained and educated out of the income of such property during their minority, and the surplus to be invested during such their minority, and upon the youngest, or the survivor or survivors of them, attaining twenty-one, to divide the personal estate, share and share alike. And upon any of the children attaining twenty-one, the executors were directed to advance such sum as might be necessary to establish such child in business, etc. And all the residue of his personal estate was to be held by his executors and divided at the same time as the lands.

Held, (1) [affirming the judgment of the Court below], that one of the sons who had attained twenty-one, was not entitled to maintenance out of the estate.

Held, (2) [varying the same judgment] that the four children took vested and not contingent interests in the residuary real and personal estates, the interest in the real estate being liable to be defeated as to any one or more of them, upon the condition subsequent of death before partition leaving issue, in which event the share of the deceased would go over to the issue.

Clute, for the appellant.

J. K. Kerr, Q.C., for infant devisees.

Lash, Q. C,. for future heirs.

DOMINION SAVINGS & INVESTMENT COMPANY *v.* KILROY.

Married Womens' Act—R. S. O. 187, c. 125, ss. 5-7—Wife's separate property.

A married woman carried on business in her own name, the business being managed for her by her husband. For the purpose of the business she purchased the goods constituting her stock in trade and which the vendor sold to her upon her credit exclusively, and not to her husband.

Held, that even though the business might not be the business of the wife, carried on by her separately from her husband, within the meaning of section 7, so as to protect the earnings from the husband's creditors, the goods so sold to the wife were her own property, under section 5 of the Act, and were not liable to be taken in execution at the suit of the husband's creditors.

Quære, Whether this would be so with regard

to goods purchased to be paid for out of earnings of such a business.

Meakin v. *Gampson*, 28 C.P., 360, doubted, per Burton J. A.

Judgment of the C.P.D.affirmed.

THE QUEEN *v.* THE CITY OF LONDON.

Criminal procedure—Indictment for nuisance—Appeal—R. S. C., chap. 174-268, 50-51 Vict. ch. 50 (D.)

The defendants having been convicted on an indictment for a nuisance, which had been removed into the Queen's Bench by *certiorari*, moved for a new trial, which was refused.

Held, that no appeal would lie to this Court from the judge refusing the new trial, and that it could make no difference that the indictment had been removed by *certiorari* and tried on the civil side.

Regina v. *Eli*, 13 A.R., 626,and *Regina* v. *Laliberte*, I.S.C.R., 117, referred to.

Quære, whether in any case of misdemeanor a new trial can now be granted. C.S.U.C. chapters 13, 112, 113; 32 & 33 Vict. ch 29,sect. 80 (D.)

DUNKIN *v.* COCKBURN.

Free Grant and Homesteads Act, R. S. O., 1877, c. 24, s. 4—31 Vict., c. 8, s. 3—Patent—Reservation by order in council—Trespass.

Plaintiff was a locatee of a Free Grant and Homestead lot, which at the time he located it, in May, 1879, was subject to a regulation of an Order in Council of the 27th of May, 1869, providing that holders of timber licenses should have the right to haul their timber or logs over the uncleared portion of any land so located, and to make necessary roads thereon for that purpose, etc. The patent in favor of plaintiff was issued in June, 1883, and contained only the usual reservations of mines, minerals and navigable waters. The defendant was the holder of a timber license issued after the date of the patent, and justified the trespasses complained of under the authority of the Order in Conncil.

Held, that the only reservations or exceptions from the grant were those mentioned in the patent, and that the plaintiff's land was not subject to the regulations of the Order in Council.

Semble, that such regulations apply only before the issue of the patent to lands located under the Order in Council, and then only so far as rights of way, etc., may be expressly conferred upon the licensee by the terms of his license.

Judgment of Q.B.D. affirmed.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Div'l Ct.] [Nov. 19, 1888.

MARSHALL *v.* MCRAE.

Master and servant — Wrongful dismissal—Written contract—Consideration—Remedy on covenant—Construction of contract—Right to dismiss—Reasonable grounds—Bona fide exercise of power—Manner of exercise.

The plaintiff agreed to obtain patents for certain improvements in a machine of his invention and to assign them to the defendant, and the defendant, in consideration thereof, agreed to employ the plaintiff for two years for the purpose of demonstrating and placing the patents on the market, the defendant covenanting to pay the plaintiff a certain sum per month and expenses, during the two years, and to give him a share of the profits, and the plaintiff covenanting to devote his whole time and attention to the "business of the defendant."

By the 10th clause of the agreement it was provided that the defendant should be the absolute judge as to the manner in which the plaintiff performed his duties, and should have the right at any time to dismiss him for incapacity or breach of duty.

The defendant summarily dismissed the plaintiff within three months for alleged breach of duty in relation to work not within the terms of his employment as above specified.

Held, that the work to be performed not being the only consideration for the wages to be paid, but for the tenth clause the defendant would have had no right to dismiss the plaintiff at all, but would have been left to his remedy upon the plaintiff's covenant.

"The business of the defendant" meant the business for which the plaintiff was employed, and the defendant had no legal right

to dismiss the plaintiff for alleged breach of duty in connection with work not within the terms of his employment; and even if such work was within the terms of his employment the defendant had, upon the evidence, no reasonable grounds for dismissing the plaintiff.

Held, also, that where one party puts himself in the power of the other, the latter should exercise the power with entire good faith; and, upon the evidence, that the defendant had not exercised the power given him by the 10th clause, in good faith, but even if he had, that he had not exercised it in a legal manner, for he was bound to give the plaintiff an opportunity to be heard and to explain his alleged misconduct, which he did not do.

Carscallen, for the plaintiff.

Osler, Q.C., and *J. J. Scott*, for the defendant.

Robertson, J.] [Dec. 20, 1888.

DOMINION BANK *v.* DODDRIDGE.

Notice of motion for judgment—Dispensing with service of—Con. Rule 467—Sufficient cause.

Upon a motion to the Court for judgment on the statement of claim in default of defence, the plaintiffs asked for an order dispensing with service of notice of the motion upon the defendant under Con. Rule 467. It was not shown that defendant could not be served. The order was refused.

Held, that the fact that the defendant had been personally served with the writ of summons and statement of claim and had not appeared was not "sufficient cause" within the meaning of the rule.

Div'l Ct.] [Dec. 22, 1888.

ANDERSON *v.* FISH.

Sale of goods—Stoppage in transitu—Consignor and consignee—Right of carriers to prolong period of transitus.

The defendants, unpaid vendors of goods, shipped the goods over the Grand Trunk Railway to the vendee at W. When the goods arrived the railway company's agent at W, sent an advice note to the vendee, who refused to take it. After this the vendee assigned to the plaintiff for the benefit of his creditors, and the plaintiff, as soon as the assignment was perfected, produced it to the railway company's agent and claimed the goods, offering to pay the freight, but producing no advice note. The agent did not refuse to deliver the goods, but said that according to the rules of the company, when the person claiming the goods was an assignee for the benefit of creditors his duty was to telegraph to the company's solicitor for instructions. He did so telegraph, but before he received an answer, and on the same day, the defendants notified him not to deliver the goods to the vendee or his assignee, assuming a right to stop them in transitu.

Held, FALCONBRIDGE J., dissenting, that the action of the railway company's agent in delaying till he received instructions from the solicitor was not wrongful, that the *transitus* was not at an end when the defendants intervened, and the right of stoppage was well exercised.

G. T. Blackstock, for the plaintiff.

J. B. Clarke, for the defendants.

Div'l Ct.] [Dec. 22, 1888.

ISBISTER *v.* SULLIVAN.

Courts—Interpleader—Jurisdiction of District Court of Thunder Bay—Jurisdiction of High Court of Jnstice—R. S. O. c. 91, s. 56.

The District Court of the Provisional Judicial District of Humber Bay has jurisdiction in interpleader under R. S. O., c. 91, s. 56, for it has "the jurisdiction possessed by County Courts," which is by R. S. O. (1877), c. 43, s. 19, s.s. 6, "in interpleader matters as provided by the Interpleader Act;" and such jurisdiction is determinable in a sheriff's interpleader by the fact whether the process under which the goods were seized has issued out of the District Court, and not by the amount for which the recovery was had or the process issued. (See *R. S. O.* (1877), *c.* 54, *s.* 22.)

The High Court of Justice has no jurisdiction, by virtue of R. S. O. c. 91, s. 56, s.s. 2, or otherwise, to entertain a motion against a verdict or judgment obtained in the District Court in an interpleader issue.

Delamere, for the plaintiff.

Aylesworth, for the defendant.

Full Court.] [Dec. 22, 1888.

REGINA *v.* PERRIN.

Justice of the Peace—Summary conviction under R. S. O. c. 214, s. 15—Dog killing sheep—Award of compensation—Proving character of dog—Territorial jurisdiction of justices—R. S. C. c. 178, s. 87.

The owner of a sheep killed or injured by a dog can, under R. S. O. c. 214, s. 15, recover the damage occasioned thereby, without proving that the dog had a propensity to kill or injure sheep, and the Act applies to a case where the dog has been set upon the sheep.

It did not appear upon the face of the conviction in question that the offence was committed within the territorial jurisdiction of the convicting justices ot the peace, but upon the deposition, it was clear that it was so committed.

Held, that the saving provision of s. 87 of R. S. C., c. 178, should be applied, and the order *nisi* to quash the conviction was discharged.

Shepley, for the defendant.

Q. B. Div'l Ct.] [Nov. 19, 1888.

BANK OF HAMILTON *v.* ISAACS.

Evidence—Action against indorser of promissory note—Denial of indorsement—Admissibility of evidence as to circumstances connected with the indorsement—New trial.

I., the maker, and F., the indorser, of a promissory note, were sued upon it, and F. denied his indorsement.

At the trial an indenture of conveyance of land from I. to F. was put in without objection, and I. testified that it was given to secure F. against his indorsement of certain notes of which the one sued on was a renewal. There was nothing in the indenture to show that it was given for anything but the expressed consideration of $1,500, and it was not pretended that such consideration was paid.

Held, that it was competent for F. to show what the indenture was given for, that it was not given to secure him against such indorsement, and therefore evidence of the existence of an indebtedness from I. to F. upon an open account was receivable to support the proof that it was given to secure such indebtedness.

I. was asked whether F. did not say to him when he asked him to indorse one of the series of note, of which the one in question was a renewal, that he, F., never backed anybody's note.

Held, that this question was irrevelant, and I's answer to it conclusive, and evidence contradicting such answer was inadmissible.

Held, also, that, having regard to the whole case and the charge of the trial, judge adverting to evidence improperly received and to its importance, substantial injury and miscarriage were thereby occasioned, and there was sufficient ground for granting a new trial.

McCarthy, Q.C., for the plaintiff.

Lount, Q.C., for the defendant, F.

Chancery Division.

Div'l Ct.] [Sept. 22, 1888.

HUGHES *v.* ROSE *et al.*

Mortgagor and mortgagee—Power of sale—Notice of sale—Effect of second mortgage taken as collateral to first.

A, being a mortgagee from B, made him a further advance and took a second mortgage for the amount of both advances and as collateral to the first.

Held, that the remedies under the first mortgage were not surrendered, and that a sale under notice given under the first mortgage was a good sale.

The notice of sale was a double one: (1) "That the mortgagee would without further notice, enter into possession and sell and dispose of the lands," and (2) "That the sale would take place on 28th January." The latter became inoperative because service was not made two months (the required time) prior to that date. A sale was subsequently had two months after the notice, which was not complained of as being otherwise improper or improvident.

Held, a good sale.

The plaintiff appeared in person.

Moss, Q.C., *Delamere*, *Shepley*, *J. B. Clarke*, *G. H. Smith*, *J. M. Clarke*, *Dean* and *Campbell*, for defendants *contra*.

Practice.

Street, J.] [Dec. 11, 1888.

BURKE *v.* PITTMAN.

Indemnity—Relief against co-defendants—Proceedure where such relief claimed—Trial of questions raised.

No order is necessary to enable a defendant to plead a claim for indemnity against his co-defendant, but such a claim will not be tried without an order providing for the determination of the question so raised.

P. borrowed money from the plaintiff and then went into partnership with N.; P. and N. afterwards sold the business to B. The plaintiff, having judgment against P., brought this action against P., N. and B., to set aside the sale to B. as fraudulent. P. alleged in his defence that N. agreed to pay half his debts, including that to the plaintiff, and that B. agreed to pay the liabilities of P. and N. appearing on their books, which the liability to the plaintiff did, and he claimed indemnity against N. and B.

Held, that the trial of the question whether or not the sale to B. was fraudulent as against the plaintiff, would involve an inquiry as to the terms upon which B. purchased from the other defendants, and that the whole matter was one that might be advantageously disposed of at one hearing.

Geo. Macdonald, for the plaintiff.

Geo. Ritchie, for the defendant P.

Gunther, for the defendants, N. and B.

Q.B. Div'l Ct.] [Dec. 22, 1888.

SMITH *v.* FLEMING.

Costs—Covenant for renewal lease, construction of—Costs of lease—Costs of reference and award—Costs of action for arbitrators' fees.

The judgment of FERGUSON, J., 12 P.R. 520, affirmed on appeal, substantially on the same grounds.

Marsack v. *Webber*, 6 H. & N. I., referred to as an authority for the disposition made of the costs of the arbitration.

In re Autotheptic Steam Boiler Co., 21 Q.B.D., 182, distinguished.

J. K. Kerr, Q.C., and *Arnoldi*, for the appellants.

S. H. Blake, Q.C., and *Tilt*, Q.C.. for the respondent.

Q. B. Div'l Ct.] [Dec. 22,1888.

LEITCH *v.* GRAND TRUNK R.W. Co.

Discovery—Examination of officer of corporation—R. S. O. (1877), c. 50, s. 156—Railway conductor—Discovery before second trial from witness examined at first trial.

Held, (1) Affirming the decision of MACMAHON, J., 12 P.R., 541, that the conductor of a train of the defendant's, through whose alleged misconduct the plaintiff was injured, was an officer of the defendant's within the meaning of R. S. O. (1877) c. 50, s. 156, examinable for discovery in an action for the injuries sustained.

(2) Reversing the decision of MACMAHON, J. (FALCONBRIDGE, J., dubitante), that such conductor could be examined by the plaintiff before a second trial, notwithstanding that he had been examined as a witness at the first trial, and been cross-examined by counsel for the plaintiff, and had then offered to produce a certain book in his possession.

W. R. Meredith, Q.C., for the plaintiff.

Aylesworth, for the defendants.

Appointments to Office.

DIVISION COURT CLERKS.

Haldimand.

Thomas Bridger, of Cayuga, to be Clerk of the Second Division Court of the County of Haldimand, *vice* William Mussen, deceased.

Leeds and Grenville.

M. S. Denant, of Bastard, to be Clerk of the Sixth Division Court, *vice* W. H. Denant, resigned.

Algoma.

Robert E. Miller, of Bruce Mines, to be Clerk of the Second Division Court of the District of Algoma, *vice* Thomas Collins, resigned.

BAILIFFS.

Wellington.

William M. Franks, of Fergus, to be Bailiff of the Fourth Division Court of the County of Wellington, *vice* A. McMillan, resigned.

Brant.

Daniel Dunn, of Burford, to be Bailiff of the Fourth Division Court of the County of Brant, *vice* J. Jackson, resigned.

Stormont, Dundas and Glengarry.

Simon Warner, ot Osnabruck, to be Bailiff of the Fourth and Eighth Division Courts of the united Counties of Stormont, Dundas and Glengarry, *vice* Lyman Warner, resigned.

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THE many friends of Chancellor Boyd (and by his many friends we mean the whole legal profession and everyone else who knows him), regret his severe illness. If there is one member of the Ontario Judiciary more than any other whose absence from official duty is a public loss, the learned President of the High Court is the one. We are glad to learn that he is somewhat better, and sincerely hope for his speedy restoration to complete health.

A MATTER which we think is ripe for reform is that of printed appeal books in the Court of Appeal. The practice of requiring these is quite unjustifiable, in our opinion, and the County of York Law Association might well take the subject up. The Court of Appeal in England requires no printed appeal books, and the consequence is not only a great saving of expense, but greatly increased expedition in hearing cases. We could point to a Canadian solicitor who, being interested in a case in the Courts in England, was surprised to find that, two days after judgment before the Judge of first instance, the case was up for argument before the Court of Appeal. To come nearer home, our own Divisional Courts, which are practically Courts of Appeal, require no printed appeal cases, and what is enough for three Judges should be enough for four. The profession have, as it is, to bear a very heavy burden in being made tax collectors for the Province, and it is time that the further burden of printed appeal books was taken off their shoulders.

THE LAW OF DIVORCE.

THE receipt of an early copy of Mr. Gemmill's book on the Law of Divorce in Canada again draws our attention to this important subject.*

We are among those who think the encouragement of divorce a great evil and would rather have it wholly denied in Canada, than to see Divorce Courts

*The Practice of the Parliament of Canada upon Bills of Divorce, including an historical sketch of Parliament Divorce and summaries of all the Bills of Divorce presented to Parliament from 1867 to 1888; also notes on the Provincial Divorce Courts, etc., by John Alexander Gemmill, of Osgoode Hall, Barrister-at-Law, Toronto: Carswell & Co., Publishers, 1889.

established amongst us of the character and range, as to cause, of those in the United States.

In most Christian countries divorce is permitted for the one great matrimonial crime, and unfortunately, we think there is a tendency to expand the grounds upon which it may be granted, and to drive the machinery as rapidly as a small debt case moves in a Division Court. Under the constitution of this Dominion, divorce is fortunately reserved to Parliament, which in its discretion makes a law in a particular case severing the marriage bond. The trial and preliminary enquiry has always been before the Senate. The mode of procedure was ill defined and unsatisfactory, and until last session never received any particular consideration. But owing mainly to the exertions of Senator Gowan, the matter was taken up and the procedure entirely remodelled and systematized under a complete set of new rules. When these were established a free opening was given for a full examination, treating the subject as a whole. And this we find well and ably done by Mr. Gemmill, an experienced Parliamentary practitioner, in the book before us. He has produced a work of great practical value, and one showing much careful research and very able treatment of the material he collected.

The subject matter had not before been treated of by any Canadian writer; indeed only last session did it become ripe for full consideration. It is true that a number of cases have been before Parliament since Confederation, but they were little known and were never before collected and examined. Legislation would seem to have been without any very clear or very definite principle of action, and the procedure was certainly faultly and ill-defined. In truth there could be no full view of the subject as now; the ground was not before prepared for consideration of principles and exactness in procedure.

As already observed, this is changed to a great extent under the rules of last session. But much will depend upon careful and intelligent administration, and in this respect we are inclined to think Parliament has advantages over a Divorce Court. It will certainly have a larger grasp and will be capable of ever holding in chief regard the higher interests of morality, and ought to be able to dispose of individual cases in a manner consistent with justice and equity.

A carefully prepared work like the one before us must be an invaluable aid in securing safe and uniform administration, and as useful as such works have been found in the business of the ordinary courts.

In addition to full and comprehensive notes on the rules, and clear instructions as to procedure from the notice of application for divorce till the final passing of the bill, Mr. Gemmill's work gives an excellent epitome of the history of legislative divorce, and all the cases before Parliament for the last twenty-one years. A great many important general questions are considered and much useful information given in an appendix.

A better idea may be obtained of the comprehensive character of the work by referring to the chapters.

Chap. 1.—In some sixteen pages gives in outline the origin and history of divorce in England.

Chap. 2.—Covers some twelve pages and makes the reader fully acquainted with the history of divorce in Canada, a most interesting and instructive chapter.

Chap. 3.—Treats of marriage, and presents very clearly the sacred character of the tie, and the function Parliament properly exercises in dissolving it.

Chap. 4.—Gives an account of the several Provincial Divorce Courts in Canada, and the time and mode of constitution of each, and their jurisdiction; and also shows what powers are exercised by the ordinary courts in connection with marriage in those Provinces in which no Divorce Courts are established.

Chap. 5.—Is confined to Parliamentary divorce in Canada, and fully covers the ground.

Chap. 6.—Discusses the question of equal rights of husband and wife to relief.

Chap. 7.—Is a chapter of great value, treating of the jurisdiction of Parliament under the B.N.A. Act, and gives some extended remarks in respect to domicile.

Chap. 8.—Is perhaps the most important to the practitioner, in it every one of the twenty-three new rules being carefully annotated and explained, in some cases at considerable length; for example, the notes on the rule as to the first reading of the bill and suggestions as to preparing it, fill four pages. The rule as to evidence, defences, and the intervention of the Minister of Justice, takes nineteen pages. The work is well done and much and valuable information brought together and conveniently arranged.

Chap. 9.—The Procedure in the House of Commons.

Chap. 10.—Gives a general outline of procedure on bills of divorce.

Chap. 11.—Deals with the effect of divorce as to marriage and property.

And then follows a tabulated statement and summary of the several cases before Parliament since Confederation.

The most cursory glance through the book will convince any one of the great labor bestowed upon it. Some of the topics discussed in the early chapters are very important and suggestive. We may be able at a future day to notice them more at length, but can now do no more than call attention to this valuable work, and can only say, speaking of it in a general way, that it shows careful and extended research by one who evidently understands his subject. To the general reader it throws a flood of light upon the history of divorce in Canada and elsewhere, and several moral and constitutional questions are discussed with much ability. To the practioner and Parliamentary counsel it is simply invaluable. The whole is well written and in a good spirit. The author has evidently felt that marriage and the family are important social concerns, and a conscientious care in examination and treatment is manifest in every page. We hope Mr. Gemmill's book will bring to the author all the credit and advantage it so well deserves.

COMMENTS ON CURRENT ENGLISH DECISIONS.

SALVAGE—QUEEN'S SHIP—RIGHT TO REWARD.

The Ulysses, 13. P .D. 205, was a case of salvage. The vessel, with a valuable cargo, stuck on a reef on an uninhabited island in the Red Sea, near the mainland, and the crew began to jettison part of the cargo, which they threw into shallow water. Armed Arabs then crossed over from the mainland and began to plunder the cargo. A Queen's ship having come up, the commander anchored near the wrecked vessel, and sent a number of his crew to act as sentinels on the beach of the mainland, who were posted for about a mile along the beach, exposed to severe heat. Others of the crew were employed in discharging the cargo, working up to their waists in water, which was greatly fouled. They threw out the cargo and hauled it across the reef, where it was collected by the sentinels and laborers. The commander and crew of the Queen's ship claimed salvage, and it was held by the President (Sir Jas. Hannen) that the services rendered were beyond the scope of their public duty and were salvage services for which they were entitled to remuneration.

NULLITY—AGREEMENT NOT TO SUE—CONSIDERATION.

Aldridge v. *Aldridge*, 13 P.D. 210, is deserving of a brief notice. The action was brought by a husband against his wife for a decree of nullity of marriage on the ground of the malformation of the wife, which prevented the consummation of the marriage. The respondent set up as a bar to the suit that the parties had entered into an agreement of separation, each agreeing not to molest the other or to bring any suit against the other. This was held by the President (Sir Jas. Hannen) to be a bar to the action.

PRACTICE—SUBSTITUTED—SERVICE OF DEFENDANT—WAIVER OF RIGHT TO MOVE, TO SET ASIDE ORDER FOR SUBSTITUTED SERVICE.

The only point for which it is necessary to notice, *Boyle* v. *Sacker*, 39 Chy. D. 249, is this: An order had been made for substituted service on the defendant, who was residing out of the jurisdiction, of the writ of summons, and notice of motion for an injunction. The defendant did not enter an appearance, but appeared by counsel on the motion for injunction, and filed affidavits and argued the case on the merits; and it was held by the Court of Appeal on a motion to discharge the order for substituted service, that the defendant's proper course was to move to discharge the order in the Court below, but that after arguing the injunction motion on the merits, he could not be heard to say that he was not properly served.

WILL—PRECATORY TRUST—"IT IS MY DESIRE THAT SHE ALLOWS."

In re Diggles Gregory v. *Edmonson*, 39 Chy. D. 253, is a case which shows the strong disinclination of the Court now-a-days to extend the doctrine of "precatory trusts." A testatrix gave all her property, real and personal, to her daughter,

"her heirs and assigns: and it is my desire that she allows to A.G. an annuity of £25 during her life, and that A.G. shall, if she desire it, have the use of such portions of my household furniture as may not be required by my daughter." The daughter and her husband were appointed executors. It was held by the Court of Appeal (Cotton, Bowen and Fry L.JJ.) (reversing the Vice-Chancellor of the County Palatine), that no trust or obligation to pay the annuity, or to permit the use of the furniture, was imposed on the daughter, but that there was only a request to the daughter, not binding on her at law, to make that provision for A.G. Cotton L.J. at p. 257 says: "No doubt in the old cases slight expressions were laid hold of to create a trust, but the recent authorities have gone the other way. I adhere to what I said in *In re Adams* v. *the Kensington Vestry*, 27 Chy. D. 394, 410: 'Having regard to the later decisions, we must not extend the old cases in any way, or rely on the mere use of any particular words, but, considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator as expressed in his will.' A reasonable construction is to be given to the will."

COMPANY—WINDING UP—CONTRIBUTORY—AGREEMENT TO APPLY DEBT IN PAYMENT OF CALLS.

In re Land Development Association, 39 Chy. D. 259. The decision of Kay, J., noted *ante* vol. 24, p. 270, was affirmed by the Court of Appeal (Cotton, Fry and Lopes, L.JJ.)

WILL—CONSTRUCTION—REMOTENESS—DIVISIBLE GIFT.

In re Harvey, Peek v. *Savory*, 39 Chy. D. 289, the Court of Appeal (Cotton, Bowen and Fry, L.JJ.) differed from the construction placed by North, J., on the will of a testatrix whereby she made an alternative limitationof her real estate to her right heirs in case both her daughters (for whom and their husbands and issue provision had been made by the will) should die without having any child, *or the issue of any child* living at the decease of the survivor of them, or the survivor of their respective then present or any future husbands. Neither of the daughters married again, and each of them died leaving her husband surviving, but no issue. The Court of Appeal held that the gift over was not in the alternative on the happening of either of two distinct events, but a single gift over on one event involving two things, and that as the testatrix had not separated the gift, the Court could not separate it and that it was therefore void for remoteness.

TRUSTEE—TRUSTEE RELIEF ACT—PAYMENT INTO COURT—COSTS—JURISDICTION.

In re Parker's Will, 39 Chy. D. 303, shows that when a trustee pays money into Court under the Trustee Relief Act and deducts his costs and expenses, that on an application to pay out the fund, the Court has no jurisdiction to order payment of the costs and expenses so deducted; but that if it is claimed that costs and expenses have been improperly retained by the trustee, separate proceedings must be taken by writ.

COMPANY—WINDING UP—TAXES, DISTRESS FOR—INJUNCTION—(R.S.C., c. 129, s.s. 16. 17.)

In re Dry Docks Corporation of London, 39 Chy. D. 306, was an application by the liquidators of a company to restrain proceedings by distress to enforce the payment of municipal taxes which had become due for the current half year in respect of the Company's premises before the commencement of the winding up, but after a provisional liquidator had been appointed. Kay, J., held that the municipal authorities were not entitled to any priority in respect of the taxes, and ought to be restrained from proceeding by distress to collect them; but the Court of Appeal (Cotton, Fry and Lopes, L.JJ.) were of opinion that as the right of distress was defeated only by the appointment of a provisional liquidator, the case was one where, if leave to distrain had been applied for, it should have been granted, and that therefore an injunction could only be granted on the terms of the liquidators paying the taxes.

PRACTICE—EXAMINATION OF DEFENDANT FOR DISCOVERY.

In re Morgan, Owen v. *Morgan*, 39 Chy. D. 316, the plaintiff as executrix of Anne Morgan, sued the defendant as executor of Howel Morgan, alleging that Howel Morgan had received £6,000 in trust for Anne Morgan, had invested it in securities producing 5% per annum and applied the interest to his own purposes, and claiming payment of the £6,000 with interest. The defendant alleged ignorance of the matters alleged by the plaintiff and set up several alternative defences; (a) that Howel Morgan had not received the £6,000; (b) that if he had, he had paid it to Anne Morgan; (c) that if he received the £6,000, Anne Morgan had agreed that he should retain it for his own use as a gift from her; (d) that if he received it, Anne Morgan had agreed that he should retain it in satisfaction of a claim which he had against Anne Morgan; (e) that Anne Morgan was, at her death, indebted to Howel Morgan in a sum exceeding the £6,000. The plaintiff, for the purpose of discovery by interrogatory 18, asked the defendant to give particulars as to the way in which the £6,000 had been invested by Howel Morgan and at what rate of interest, and how the income had been disposed of; and by interrogatory 23, he asked whether the defendant was not the brother of Howel Morgan, and whether, during the period of the transactions referred to in the statement of claim, he had not lived with him and acted as his confidential agent with respect to his property and become acquainted with all his affairs. In answer to interrogatory 18 the defendant stated that Howel Morgan had invested the £6,000 and applied the income to his own purposes, and declined to answer further or to make any answer at all to interrogatory 23. North, J., ordered him to put in further answers to both interrogatories; but on appeal, the Court (Cotton, Fry and Lopes, L.JJ.) held that as the plaintiff was not seeking to follow the investments of the £6,000, the defendant was not bound to give particulars of the investments; but that as the defendant did not admit the receipt of 5% interest, he was bound to state the amount of interest which had been received, as that would enable the Court, at the hearing, in the event of

the plaintiff establishing the trust, to make an immediate decree for payment of principal and interest. But it was held by Fry and Lopes, L.JJ. (Cotton, L.J., dissenting), that the defendant was not bound to answer interrogatory 23, because an interrogatory asking in substance whether the defendant had not been in such a position that he must know whether the allegations in the statement of claim were true or false, did not relate to any "matter in question in the cause" within the meaning of Ord. 31, r. 1 (Sec. C.R. 487) This appears to be rather a technical restriction of the right of discovery, and we doubt whether it would prevail in this Province.

PRACTICE—ATTACHMENT—ORD. 44, R. 2 (C.R. 879)

In *Davis* v. *Galmoye*, 39 Chy. D. 322, it was held that an application for leave to issue a writ of attachment for contempt, must be made in Court and not in Chambers : Ord. 44, r. 2 (C.R. 879).

COMPANY—DIRECTOR—QUALIFICATION SHARES, TRANSFER OF, TO ESCAPE LIABILITY—MEMBERS—SHAREHOLDERS.

Perhaps the only points for which it is worth noticing *In re South London Fish Co.*, 39 Chy. D. 325, is the decision of Kay. J., which was affirmed by the Court of Appeal (Cotton, Fry and Lopes, L.JJ.), that directors of a company cannot validly transfer their qualification shares for the purpose of escaping liability, and that their doing so is a fraud on the creditors of a company; and also the dictum of Cotton, L.J., that "members" of a company does not necessarily mean "shareholders," and that directors may continue to be "members" even though they have parted with their shares.

MASTER AND SERVANT—DISMISSAL OF SERVANT FOR BREACH OF DUTY—SECRET PROFIT MADE BY SERVANT.

In Boston Deep Sea Fishing Co. v. *Ansell*, 39 Chy. D. 339, the defendant was employed as managing director of the plaintiff company for five years at a yearly salary. On behalf of the company the defendant contracted for the construction of fishing smacks, and, unknown to the company, took a commission from the shipbuilders on the contract. Several months afterwards the plaintiffs dismissed the defendant on the ground of other alleged acts of misconduct, which they were not able to substantiate in the action, being at the time ignorant of his receipt of the commission from the shipbuilders. The defendant was a shareholder in an Ice Company and Fish Carrying Company, which paid in addition to ordinary dividends, bonuses to shareholders who were owners of fishing smacks and employed the companies in supplying ice and carrying for them. The defendant employed these companies in respect of the plaintiffs' smacks and received bonuses as if the smacks were his own. The plaintiffs brought the action to compel the defendant to account for commissions and bonuses so received

by him, and for damages for breach of duty: the defendant counter-claimed for wrongful dismissal. The Court of Appeal (Cotton, Bowen and Fry, L.JJ.) held (reversing Kekewich, J.) that the receipt of a commission from the ship-building company was a good ground for dismissal, although it was not discovered until after the dismissal had taken place; and though it had happened several months previously, and might have been an isolated act; and that the defendant must account for the bonuses received from the ice and carrying companies, although the plaintiffs would not themselves have been entitled to the bonuses, not being shareholders; and that as the defendant's salary was payable yearly, he was not entitled to any part of the salary for the current year in which he was dismissed. Cotton, L.J., at p. 357, says:—"If a servant, or a managing director, or any person who is authorized to act, and is acting, for another in the matter of any contract, receives, as regards the contract, any sum, whether by way of percentage or otherwise, from the person with whom he is dealing on behalf of his principal, he is committing a breach of duty." And further on, he says: "When an agent entering into a contract on behalf of his principal, and without the knowledge or assent of that principal, receives money from the person with whom he is dealing, he is doing a wrongful act, he is misconducting himself as regards his agency, and, in my opinion, that gives the employer, whether a company or an individual, and whether the agent be a servant, or a managing director, power and authority to dismiss him from his employment as a person who by that act is shown to be incompetent of faithfully discharging his duty to his principal." And he goes on to say that the employer has this legal right, whenever he discovers the offence, even though it may have been committed long ago and been an isolated act; though after knowledge, if he continue the servant in his employment, he may thereby condone the offence. See *Priestman* v. *Bradstreet*, 15 O.R., 558.

BUILDING SOCIETY—ARBITRATION—ACTION AGAINST DIRECTORS, MEMBERS OF SOCIETY, FOR RETAINING MONEYS OF SOCIETY.

Municipal Building Society v. *Richards*, 39 Chy. D. 372, was an action by a building society against former directors, and the former secretary of the society, to recover moneys alleged to have been improperly retained by them The defendants were members of the society, and by the 49th rule of the society, it was provided that disputes between the society and members thereof should be settled by arbitration. The defendants applied to stay the action, and to refer the dispute to arbitration. But it was held by Stirling, J., and his decision was affirmed by the Court of Appeal (Cotton, Bowen & Fry, L.JJ.), that a claim by a society against its officer for misappropriating and keeping in his hands moneys of the society, was not a dispute between the society and a member thereof "in his capacity of a member," and the motion was therefore refused.

WILL—CONSTRUCTION—LIMITATION TO "EVERY OTHER SON AND SONS TO BE BEGOTTEN"—ELDEST SON EXCLUDED.

In *Locke* v. *Dunlop*, 39 Chy. D. 387, Stirling, J., was called upon to construe a will whereby the testator devised real estate to his second son for life, with remainder to his first and other sons in tail male; with remainder to the third son for life, with remainder to his first and other sons in tail male; with remainder to the testator's fourth, fifth, and every other son and sons to be begotten, born, or *en ventre sa mere*, at the time of his decease successively in tail male, with remainder to the testator's daughters begotten, or to be begotten as tenants in common in tail; all the testator's sons, except the eldest, having died without issue male, the eldest son claimed the estate; but it was held by Stirling, J., and also by the Court of Appeal (Cotton, Fry & Lopes, L.JJ.) that having regard to the various limitations of the will, the eldest son was excluded from taking under the words "every other son," and although the words "to be begotten" do not in their primary legal sense point to futurity, yet they will be held to do so if such an intention can be gathered from the will.

PRACTICE—SERVICE OUT OF JURISDICTION—PETITION UNDER TRUSTEE RELIEF ACT FOR PAYMENT OF MONEY OUT OF COURT.

In re Jellard, 39 Chy. D. 424, North, J., held that the Court had no jurisdiction to allow service out of the jurisdiction of a petition under the *Trustee Relief Act*, for payment of money out of Court. But on appeal, if appearing that the order sought by the petition was one to carry into full effect an order which had been recently obtained by the respondent, the Court of Appeal, without deciding that leave was necessary, gave leave to serve the petition on the solicitors who had presented the former petition, and who were willing to accept service.

WILL—CONSTRUCTION—GIFT OVER ON DEATH WITHOUT LEAVING ANY CHILD OR CHILDREN SURVIVING.

In re Hamlet Stephen v. *Cunningham*, 39 Chy. D. 426, the Court of Appeal (Cotton, Fry & Lopes, L.J.J) affirmed the decision of Kay, J., 38 Chy. D. 183, noted *ante*, vol. 24, p. 361. The Court holding that the rule laid down in *Howgrave* v. *Cartier*, 3 V. & B. 79, in favor of putting on a settlement or will making a provision for a family, such a construction as will give the children indefeasible interests on their attaining 21, is only a rule of construction to be applied in construing ambiguous words, and is not a positive rule which will modify the effect of plain and unambiguous words.

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

MICHAELMAS TERM, 1888.

DURING this term the following gentlemen were called to the Bar, viz :—

November 19th.—William Francis Johnston, with honours, and awarded a gold medal ; John Frederick Dumble, John Alexander Victor Preston, James Henry Macnee, William Craig Chisholm, Ira Standish, Arthur Collins, Thomas Walmsley, George Frederick Bradfield, Alexander Dobbs Cartwright, Henry M——— East, Alexander Cameron Rutherford, Thomas Scullard, Frederick Clarence Jarvis, Malcolm Smith Mercer, Matthew Ford Muir, Alfred Burke Thompson Edward William Hume Blake, William Edmund Thompson, Donald Reginald' Anderson, Albert Edward Kingsley Greer, Robert Grant Fisher, Gordon Joseph Leggatt, Albert Edward Taylor, Frank Howard Kilbourn, Thomas Robert Ferguson.

November 24th.—Francis Brown Denton, Herbert Macbeth, John Percy Moore, John Adelbert Wright, Horatio Venice Lyon.

November 30th.—Andrew Gordon Chisholm.

December 8th.—Thomas Martin Bowman.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz :—

November 19th.—J. A. V. Preston, J. F. Dumble, F. W. Carey, W. C. Chisholm, H. V. Lyon, J. P. Moore, H. W. Church, T. Walmsley, A. G Farrell, T. F. Johnson, D. R. Anderson, T. Scullard, A. Collins, A. D. Cartwright, S. A. Henderson, J. Coutts, F. Hornsby, L. C. Raymond, D. McArthur.

November 20th.—J. H. Macnee, A. C. Camp, W. H. Campbell, I. Standish, H. S. W. Livingston, T. Reid, M. S. Mercer, G. F. Bradfield, F. C. Jarvis, H. B. Witton.

November 24th.—W. H. Stafford, A. B. Thompson, F. H. Kilbourn, C. A. Ghent.

November 30th.—W. S. Turnbull.

December 8th.—W. F. Bannerman, T. R. Ferguson.

The following candidates passed the Second Intermediate Examination, viz :—C. E. Burkholder, with honours, first scholarship ; W. H. Hunter, with honours, second scholarship ; P. H. Bartlett, with honours, third ; H. W. Lawlor, W. J. Hatton, D. Hooey, with honours, and O. K. Fraser, W. L. Ross, A. J.

Forward, R. E. Fair, G. H. Cowan, J. Ross, E. S. Brown, W. H. Walker, G. N. Beaumont, R. V. Clement, H. W. Macoomb, A. J. J. Thibeaudeau, R. F. Lyle, R. E. Lazier, M. C. Biggar, W. G. Green, W. L. Lister, H. A. Simpson. G. J. Smith, R. W. Smith.

The following candidates passed the First Intermediate Examination, viz :—

William Johnston, with honours, first scholarship ; H. C. Boultbee, W. F. Langworthy, W. T. Evans, G. D. Grant, T. G. A. Wright, T. F. D. Hector, T. A. Beament, J. F. Tannahill, F. R. Blewett, C. P. Smith, C. Fraser, R. M. Noble, G. B. Wilkinson, F. Billings, L. V. McBrady, J. H. McCurry, W. B. Nicol, R. B. Matheson, G. P. Deacon, T. H. Lloyd, E. L. Middleton, J. B. Pattullo, H. E. Stone.

The following gentlemen have been admitted as Students-at-Law, viz :—

Graduates—William John MacDonald (as of Trinity Term), Willian John Robertson, William Stewart, Nelson Simpson, Lyman Poore Duff, Wilson Saunders Morden, George Robert Sweeney, Frederick Desmond Boggs, Charles Howard Glassford, William Henry Hodges, Alban Cartwright Macnaughton Bedford Jones, Edmund Cumming Senkler, Thomas Brown Phillips Stewart, Malcolm Mackenzie.

Matriculants—William Perkins Bull, Alexander Cowan, James Edward Dudley Day, Archibald Sloan Dickson, Francis William Hall, Herbert Ira Lyon, George Ellsworth Martin, John Milton Pike.

Juniors—Charles Lawrence Dunbar, Albert Edward Shaunessy, William Andrew Fraser, William Henry Perry, John Alfred Murphy, Arthur Carson McMaster, Frederick Charles Kerby, Hugh Matheson, Mathew James McFarlane, Charles Francis Larkin, Frank Moore, Henry David Petrie, George Mortimer Kelly, Gordon Smith Henderson, Charles Edward Gillan.

Monday, November 19th.

Convocation met.

Present—The Treasurer and Messrs. Beaty, S. H. Blake, Bruce, Ferguson, Foy, Fraser, Guthrie, Irving, Lash, Mackelcan, Martin, Meredith, Moss, Murray, Osler, Shepley.

The minutes of last meeting were read and approved.

Mr. Moss presented the Report of the Legal Education Committee.

In the case of D. J. Hurteau, recommending that he be allowed to present himself for his Second Intermediate Examination in next Easter Term.

In the case of D. S. Wallbridge, recommending that he be allowed to present himself for his Final Examination in next Hilary Term.

In the case of H. M. East, reporting that Mr. East having presented himself this Term, and having passed the call examination, they deem that no action is necessary on the part of the Committee.

The Report was ordered for immediate consideration and adopted.

Mr. Moss presented the Report of the Select Committee on Honours and

Medals in connection with the Call Examination, reporting that W. F. Johnston is entitled to be called with honours and to receive a gold medal.

Ordered for immediate consideration and adopted.

Mr. W. F. Johnston was called with honours and received a gold medal.

The Petition of S. R. Clarke was received, read and deferred to Saturday next.

The letter of the Minister of Justice relating to certain solicitors was received and read.

Ordered, that this being a communication from the Minister of Justice, and having regard to the correspondence, copies of all be sent the solicitors with a request that they would transmit to the Secretary for the information of the Benchers any explanations or observations they may wish to offer.

The letters of T. A. Gorham and E. Banane, relating to certain solicitors, were read.

Ordered, that the papers be referred to the Discipline Committee to consider and report whether *prima facie* cases are made for enquiry.

The letter of Mr. Justice Maclennan, resigning his seat as Bencher, was received and read.

Ordered, that Mr. Shepley be appointed a member of the Discipline Committee in the place of Mr. Maclennan, resigned.

Ordered, that a call of the Bench be made for Friday, 30th November, for the election of a Bencher in the place of Mr. Maclennan, resigned.

The complaint of Seth Ashton and A. F. Stevenson against a solicitor was read.

Ordered, that the papers be referred to the Discipline Committee for due enquiry and investigation.

The case of C. E. Lyon, ordered to be considered this Term, was reconsidered.

Ordered, that the whole matter be referred to the Legal Education Committee, with instructions to report on the new facts.

The Petition of G. A. Montgomery was read and ordered to be referred to the Finance Committee for report.

The letter of Mr. Read, reporting the judgment in the Hands case, was read.

Mr. Osler moved the first reading of a Rule of which he gave notice last Term, relative to the reporting in the Court of Appeal, as follows :—

"Notwithstanding anything in Section XIV. contained, there shall during the incumbency of the present reporter of the Court of Appeal, be an assistant reporter for the said Court. The salary of the reporter of the Court of Appeal shall be dollars per annum ; the salary of the assistant reporter of the Court of Appeal shall be dollars per annum."

The Rule was read a first time.

Ordered to be read a second time to-morrow.

Mr. Meredith moved the first reading of the Rule of which he gave notice as to the Intermediate Examinations, as follows :—

Where a candidate for honours is both a Student-at-Law and an Articled Clerk, the regular year in which he is for the purpose of the rules relating to scholar-

ships shall be determined by reckoning from the period from which it would be reckoned if he were Student-at-Law or Articled Clerk only, whichever shall be the earlier period.

The rule was read a first time.

Ordered, to be read a second time to-morrow.

Tuesday, November 20th.

Convocation met.

Present—The Treasurer and Sir Adam Wilson, and Messrs. Ferguson, Fraser, Hardy, Hudspeth, Irving, Mackelcan, Moss, Murray, Osler, Shepley.

The minutes of last meeting were read and approved.

Mr. Moss presented the Report of the Legal Education Committee.

In the case of F. B. Denton, recommending that his examination be allowed and that he be called to the Bar.

In the case of H. S. W. Livingston, recommending that his examination be allowed and that he be allowed to present himself for call to the Bar next Term, on showing that he has given due notice.

In the case of A. G. Farrell, recommending that his examination be allowed and that he be allowed to present himself for call to the Bar next Term, on showing that he has given due notice.

In the case of C. E. Lyons, referred yesterday, recommending that on the new facts his Second Intermediate Examination be allowed as of this present Term.

The Report was ordered for immediate consideration and adopted.

Also a Special Report upon the case of Malcolm Mackenzie, reporting that he had attended before the Committee and explained the circumstances of his previous non-attendance, and recommending that he be admitted as a Student-at-Law of the Graduate Class as of the present Term.

Ordered for immediate consideration, adopted, and ordered accordingly.

Mr. Moss presented the Report of the Special Committee on Honours and Scholarships.

Finding that Messrs. C. E. Burkholder, W. H. Hunter, P. H. Bartlett, H. W. Lawlor, W. J. Hatton, and D. Hooey passed their Second Intermediate Examination with honours, and that Mr. Burkholder is entitled to a scholarship of one hundred dollars, Mr. Hunter to a scholarship of sixty dollars, and Mr. Bartlett to a scholarship of forty dollars; that Mr. William Johnston passed the First Intermediate Examination with honours, and that he is entitled to a scholarship of one hundred dollars.

The Report was ordered for immediate consideration and adopted.

Ordered, that the honours and scholarships recommended be awarded.

Pursuant to the order of the day, the Report of the Library Improvement Committee was read.

Ordered, that the remaining long stacks suggested under item two in the plan of the Committee, be authorised, and that the Committee be authorised to cause

the shelving and partitions between the southern alcoves to be carefully removed, and that action on the remainder of the Report be deferred.

Ordered, that the orders for to-day for the second reading of rules do stand to the next meeting of Convocation.

Saturday, 24th November.

Convocation met.

Present—The Treasurer and Sir Adam Wilson, and Messrs. Bruce, Cameron, Ferguson, Hoskin, Irving, Mackelcan, McCarthy, Morris, Moss, Purdom, Robinson, Shepley, Smith.

The minutes of last meeting were read and approved.

Mr. Moss presented the Report of the Legal Education Committee, recommending that W. H. Stafford, A. B. Thompson and F. H. Kilbourn receive Certificates of Fitness, and that the examination of C. A. Ghent be allowed, notwithstanding that it was passed within nine months of his Second Intermediate, and that he do receive a Certificate of Fitness.

The Report was taken into consideration, adopted, and ordered accordingly

Mr. Hoskin from the Discipline Committee reported on the case of E. Banane, that a *prima facie* case has not been shown for enquiry.

Also in the complaint of T. A. Gorham against a solicitor, that a *prima facie* case has been shown for enquiry and investigation.

The Report was adopted.

Ordered, that the complaint of T. A. Gorham against a solicitor be referred to the Committee on Discipline for enquiry and investigation.

Mr. Irving presented the Report of the Committee appointed under the resolution of last Easter Term (June 9th, 1888), to consider the re-arrangement of the conduct of the business by the officers of the Society, in the following words :—

The Committee find that the office of the Secretary on the ground floor (in the east wing) is available for the transaction of the Society's office business, and recommend that all the work hitherto done by the Secretary and Sub-Treasurer in respect of his said office shall be discharged therein, and that the Student's Lending Library, comprising the books borrowed for reading at home, as well as the books borrowed for reading in Osgoode Hall, shall be placed there.

That the hours during which the Secretary's office shall be kept open shall be from 9 a.m. to 4 p.m., except on Saturdays, when it shall be open from 9 a.m. to 3 p.m.

To further carry out the suggestions of the resolution of 9th June, 1888, the Secretary shall receive all moneys in his office, and he shall be expected to be in attendance there, personally, from 10 a.m. to 11 a.m., daily.

The Secretary shall place one of his assistants in charge of the office to perform secretarial work by this report required to be done there. The office hours of the assistant in charge to be limited to the time while it is open.

The Secretary shall direct the other assistant to remain in the Library during the hours the same is open, to assist there and discharge all duties connected therewith, and both assistants shall discharge such other duties as the Secretary may at any time assign to either of them.

The Report was ordered for immediate consideration.

Mr. Irving moved the adoption of the Report. Read clause by clause and adopted.

A letter from R. S. David, complaining of the non-payment of an account by a firm of solicitors, was read.

Ordered that the Secretary do inform Mr. David that the matter of his complaint is not within the jurisdiction of the Society.

Mr. McCarthy presented the Report of the Reporting Committee as follows :—

(1). The late Chairman of the Committee, Mr. Maclennan, acting upon the communication of the publishers submitted herewith, gave directions for the immediate increase of 200 in the number of copies of Reports printed, making the total number 1,700.

Your Committee recommend this increase, and that a further increase of 50, making the total number 1,750, be made, to commence at the conclusion of each current volume.

Your Committee submit herewith the Report of the Editor upon the state of the work of reporting.

Your Committee is unable to report any improvement in the work of reporting in the Court of Appeal.

Your Committee is of opinion that the remedy for the unsatisfactory condition of affairs referred to, regard being had to the circumstances of the case, is to be found in the employment of an assistant reporter for the Court of Appeal, at such salary and with such duties as Convocation may determine and appoint, such modification being made in the salary of the present reporter as to Convocation may seem meet.

Ordered for consideration at next meeting of Convocation.

Friday, 30th November.

Convocation met.

Present—The Treasurer and Messrs. Beaty, Cameron, Ferguson, Foy, Fraser, Hoskin, Irving. Kerr, Mackelcan, Martin, McCarthy, Meredith, Morris, Moss, Murray, Shepley, Smith.

The minutes of last meeting were read and approved.

Mr. Moss presented the Report of the Legal Committee.

In the case of W. S. Turnbull, recommending that on his producing a release by Mr. C. A. Durand of his unexpired term of service, his service he allowed and he do receive a Certificate of Fitness.

In the case of W. J. McDonald, recommending that he be entered as a student in the graduate class as of Trinity Term last, and that his admission as a student of the junior class be cancelled, and that thereafter his standing be reckoned as a student in the graduate class from the first day of Trinity Term last.

In the case of W. E. Thompson, recommending that he be required to place himself under articles for two months and three days, and that his examination stand for favorable consideration on his proving service.

The Report was ordered for immediate consideration, adopted and ordered accordingly.

A letter was read from H. R. Hardy, asking for an appropriation for the *Ontario Legal Chart.*

Ordered, that an appropriation of one hundred dollars be made in respect of the *Legal Chart* to Mr. Hardy, for next year, on condition of his supplying the Society with twenty copies free, and that the Secretary be directed to distribute one to each County Library.

Mr. McCarthy presented the Report of the Committee on Reporting, as follows :—

(1). That they have considered the question as to the salary of the Assistant Reporter of the Court of Appeal, and the duties respectively of the Reporter and Assistant Reporter upon the appointment of the latter.

(2). The Reporter should be required to complete the work of reporting the cases in which judgment has already been given, the Assistant Reporter giving such assistance as, under the circumstances, he can reasonably do.

(3). The Assistant Reporter should be responsible for the work of Reporting the cases now standing for judgment, and the cases to be argued after his appointment. The Reporter to aid and advise the assistant in his work.

(4). That the reporter's salary shall be, from the first of January next, one thousand dollars per annum.

(5). That the salary of the Assistant Reporter shall be one thousand dollars per annum.

(6). That in future the Editor is not to certify that any Reporter's work has been satisfactorily performed, so as to entitle the Reporter to the payment of his salary, unless the reports are issued with such expedition as the Committee may from time to time determine upon and designate to the Editor.

The Report was ordered for immediate consideration, read clause by clause, and adopted.

On the order of the day for the election of a Bencher in the place of Mr. Justice Maclennan, Mr. Nicol Kingsmill was elected a Bencher.

Mr. Martin, from the County Libraries Aid Committee, presented the following Report :—

(1). The Perth Law Association—

This association has made an application for an initiatory grant and furnished due evidence of incorporation, and a copy of its declaration and by-laws and proof of the condition of its funds, and that it has acquired a suitable room for the purposes of the association, all in accordance with the rules respecting County Libraries.

Two hundred and seventy dollars have been contributed in money actually paid in, and there are twenty-three resident practitioners in the county.

Your Committee recommend that the association be paid four hundred and sixty dollars for the initiatory or first grant, such amount being less than double the amount of contributions in money and equal to twenty dollars for each practitioner, that being the full amount payable under the Rules (Section xii., clause 1, page 145).

(2). The Carleton Law Association—

This association has applied for the grant of the Reports commencing vol. 1, Ontario Reports, vol. 1, Appeal Reports, and 1, Practice Reports. It appears that under rule 16, sub-sec. 9, the association are entitled to these Reports, and therefore the Committee recommend that the application be granted.

(3). The Bruce Law Association—

This association has applied for a special grant of one hundred and eight dollars (under rule 15, sec. 22) for the purpose of purchasing the English Law Reports, which are greatly needed.

The association has also asked for the payment of the arrears of annual grants which have been withheld until the Inspector's report on the Library should have been received. The Inspector reports in favour of making the advance, and that the condition of the library has greatly improved since the making of his report.

The Secretary of the association certifies that all subscriptions in arrears and those for the present year have been paid.

Your Committee recommend that a special grant of one hundred and eight dollars be made re-payable (without interest) out of the next annual grant, security having been given to the satisfaction of Convocation for the due expenditure of the grant, and also that the arrears of the annual grants be paid as soon as the amount of these arrears are established to the satisfaction of your Committee and reported to the Finance Committee.

Ordered for immediate consideration, read clause by clause, and adopted, and ordered that it be referred to the Finance Committee to approve of the security to be given by the Bruce Law Association under the Report.

Mr. Meredith having moved the second reading of the rule as to candidates for honours,

Ordered, that "Whenever a candidate for honours in the intermediate examinations is both a Student-at-Law and an Articled Clerk the first day of the Term on which he was admitted on the Books of the Society, and not the date of his articles, shall be the time from which the commencement of his year's or course of study shall be reckoned for the purpose of the examination for honours.

The rule was read a second and third time and adopted.

Mr. Martin having moved the second reading of Mr. Osler's rule as to reporting in the Court of Appeal, it was ordered as follows :—

That "notwithstanding anything in section xiv. contained, there shall be, during the incumbency of the present Reporter of the Court of Appeal, an Assistant Reporter for the said Court.

"The salary of the present reporter for the Court of Appeal shall be one thousand dollars per annum ; the salary of the Assistant Reporter for the Court of Appeal shall be one thousand dollars per annum."

Ordered, that a call of the Bench be made for the election of an assistant reporter for the Court of Appeal, pursuant to the above rule, on Saturday, the 8th day of December, and that the usual steps be taken.

Saturday, December 8th.

Convocation met.

Present—Sir Adam Wilson, and Messrs. Beaty, S. H. Blake, Bruce, Cameron, Ferguson, Foy, Hoskin, Irving, Lash, McCarthy, Martin, Meredith, Morris, Moss, Murray, Shepley, Smith.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

The complaint of Mrs. Jane Messett against certain solicitors, was referred to the Discipline Committee, to report whether a *prima facie* case has been shown.

The Secretary read the letter of the Solicitor of the Law Society on the subject of G. M. Gardner.

The letter was referred to the Finance Committee.

The letters of the Solicitor in reference to certain solicitors were referred to the Finance Committee for report.

Mr. McCarthy, on behalf of the Reporting Committee, reported the list of applicants for the position of Assistant Reporter to the Court of Appeal, for the appointment of which a call of the Bench had been made for this day.

The Report was received and adopted.

Convocation then proceeded to the consideration of the applications, and Mr. Richard Scougall Cassels was appointed Assistant Reporter.

Ordered, that Mr. Kingsmill be placed on the Special Legal Education Committee in place of Mr. Justice Maclennan.

HALF-YEARLY MEETING.

December 26th.

Convocation met.

Present—The Treasurer and Messrs. Bell, Bruce, Ferguson, Foy, Irving, Kerr, Lash, McCarthy, McMichael, Martin, Moss, Murray, Osler, Shepley.

The minutes of last meeting were read and approved.

Mr. Murray, from the Finance Committee, presented a Report referring to the complaints against certain persons.

The Report was ordered for immediate consideration, and was considered paragraph by paragraph.

In the case of G. M. Gardner, the Report was adopted, and an order made accordingly.

The Secretary was ordered to intimate to the Solicitor the circumstances of other recent cases within the knowledge of the Benchers for action in the same connection.

In other cases, the Report was referred back to the Finance Committee for further report.

In the case of J. A. Donovan, the paragraph of the Report was adopted, and the Solicitor ordered to take proceedings.

Mr. Osler, from the Reporting Committee, presented a Report as follows :—

They have further considered the question of the respective duties of the Reporter and the Assistant Reporter, and they advise,

That the Reporter whose duty it is to report any judgment should be charged with the preservation of the manuscript, and he should be entitled to any fees payable for copies thereof.

The Report was ordered for immediate consideration, adopted and an order made accordingly.

Mr. Irving presented the Report of the Library Committee, which, as amended by Convocation, reads as follows :—

It having been suggested to members of the Committee that it is desirable that Convocation reconsider sub-section 9 of rule 13, at page 42 of the book of the Rules of the Society, which sets forth the circumstances under which books may be carried out of the Library,

The Committee beg leave to submit to the consideration of Convocation the following propositions, which they believe would not create any inconvenience should Convocation be disposed to favor any change.

(1). Text-books of which duplicates are in the Library, at least one copy of the latest edition being always retained in the Library.

(2). Legal periodicals named in the schedule to the Report may be taken out over night, to be returned at the next morning's opening of the Library.

Books relating to literature other than legal literature may be taken for a week, this definition not to include books of reference, dictionaries and encyclopædias.

If the above concessions are approved, the Committee advise that the books may be

available to Barristers and Solicitors only upon application to the Librarian, whose duty it shall be to issue them on such application, if the applicant shall not have disregarded these rules, previously taking a receipt, on which shall be recorded the time of the return of the book and its condition.

The Report was received, ordered for immediate consideration, amended and adopted.

Mr. Irving moved for leave to introduce a rule based on the Report.

Ordered accordingly.

The rule was read a first time, and was ordered to be read a second time at next meeting of Convocation.

Mr. Martin, from the Special Committee on the subject of Legal Education presented their Report as follows :—

SPECIAL LEGAL EDUCATION COMMITTEE.

OSGOODE HALL, *14th December*, 1888.

To the Benchers of the Law Society.

1. The Special Committee on Legal Education appointed by resolution of Convocation, dated 14th April, 1888, have carefully considered all the matters referred to them, and beg to report thereon as follows:

2. It is not desirable to enter into any arrangement with any University for the joint education of Students, nor to shorten in any way the period of study or service of Students.

3. It is expedient to continue and re-organize the Law School, and to appoint a President who shall have supervision and general direction of the School.

4. An improved system of legal education for Students-at-Law and Articled Clerks should be provided by the delivery of lectures and otherwise at Toronto.

5. The question of the delivery of lectures in other places than Toronto should be deferred till after experience of the working of the School.

6. The attendance of Students at the lectures and other methods of instruction to be adopted should be compulsory, but the committee did not arrive at any conclusion as to the period of such attendance in the respective cases of Students serving in Toronto and of those serving elsewhere.

7. No person should be called to the Bar unless he shall have served under articles or shall have actually and *bona fide* attended in a Barrister's office for a term of three years if a graduate, and of five years in other cases, except in special cases provided for by any Statute.

8. The present Primary Examinations for Students and Clerks by this Society should be abolished, and in lieu thereof each person applying for admission who shall present a certificate of having passed within four years of his application an examination in the subjects approved of by the Society in any University in this Province, shall be admitted upon the books.

9. The Intermediate and Final Examinations of the Law Society should be held twice during each year instead of four times as at present, namely, during May and November in each year.

10. The Committee, in accordance with the instructions of Convocation, requested the presence of a representative of each County Law Association at its meetings. They have had the assistance of delegates from some of the Law Associations who attended several of the meetings, and the Committee received from other Associations resolutions or other written communications expressive of their views. The minutes of all the meetings held by the Committee, together with the resolutions and other written communications received from the County Law Associations, are herewith submitted for the consideration of Convocation.

11. Appended hereto are certain suggestions for defining the qualifications and duties of the President and staff of the Law School, and also in regard to other matters affecting the School.

All of which is respectfully submitted,

(Signed), EDWARD MARTIN.
Chairman.

SUGGESTIONS.

(*a*) It is suggested that the President of the Law School should be a Barrister of not less than ten years standing, he should be paid a salary of $ per annum, and should devote the whole of his time to the duties of his office, including the preparation and delivery of lectures, superintending classes, and preparing questions for the classes.

(See Memo of Lectures and Law Classes for 1888-9
Weekly Notes of 13th October, 1888, p. 451.)

(*b*) There should be two Lecturers who should be paid salaries of $ for each term.

(*c*) The subjects of instruction to include the books required for Examination for Call and Admission, with such books on Civil Law, Constitutional Law and History, and International Law, as the Law Society shall from time to time determine.

(*d*) The first duty of the President should be to prepare and submit to Convocation for their approval a plan in detail for the practical work of the School, delivery of lectures, holding of Moot Court, and other means of instruction. After this plan has been approved of the standing Legal Education Committee should be charged with all matters of administration in connection with the scheme, and the President should, from time to time, receive such directions from the Committee as occasion might require.

(*e*) The School Term should open on October and close on June of each year with a vacation of weeks at Christmas, and except during vacation senior and junior classes should be held on at least two days in each week and lectures delivered to such classes on at least two days in each week; the lectures should occupy at least one hour, and the classes the same time, lectures and classes to be held at such hours as should be approved by convocation or the standing Legal Education Committee. At the close of the term an examination should be held by the President or Lecturers, subject to such regulations as the Legal Education Committee may make in regard to students taking intermediate or final examinations in May.

(*f*) Every student attending the Law School should pay $10, in advance for the term, and the school should be open to every student and articled clerk. The course of study should be three years for graduates, and the same for ordinary students. Every student should attend per cent. of the lectures and classes; special provision to be made for the students now on the books, and also students preparing for Intermediate and Final Examinations. Lectures and classes should include the books required to be read for the Intermediate and Final Examinations.

(*g*) The Intermediate Examinations should be fixed at dates to be approved of by the standing committee.

(*h*) Neither the President nor any Lecturer should act as Examiner for any Intermediate or Final Examination.

(*i*) Arrangements should be made for the publication (fortnightly between October and June) of the Examination questions and a short resumé of the Lectures delivered during the preceding fortnight.

MEMORANDUM.

From Examination of the Books of the Society, and returns obtained by the Secretary during the present month, it appears that there are about 580 Students on the Books of the Society; of these 150 are Graduates.

The number of Students residing in the different cities and towns, are as follows:—

Toronto	214	Brought forward	360
London (including County of Middlesex)	45	Guelph	7
Hamilton (including County of Wentworth)	30	Cobourg	6
Belleville	25	Brantford	5
Ottawa	27	Peterborough	4
Barrie	12	Brockville	9
Kingston	7	St. Thomas	10
		Lindsay	4
Carried forward	360	Total	405

The remainder are scattered throughout the Province.

The report was read and ordered for immediate consideration.

Mr. Martin moved the adoption of the report.

1. *Ordered* that it be considered paragraph by paragraph.
2. *Ordered*, that the consideration of the first clause of the second paragraph be postponed.

2, (*a*) *Ordered*, that the consideration of the second clause of the second paragraph be postponed.

3. *Ordered*, that the third paragraph be amended so as to read as follows:—It is expedient to continue and re-organize the Law School, and to appoint a Principal, who shall, in addition to the duty of lecturing and the discharge of such other duties as may be assigned to him, have supervision and general direction of the School.

The fourth paragraph was struck out.

The fifth paragraph was carried.

6. The attendance at the lectures and other methods of instruction shall be compulsory, as follows:—Students under service or in attendance in Toronto during the last two years of their course, and more, shall be required to take three courses—all other Students shall be required to take two courses.

7. The seventh paragraph was carrried.

8. The present Primary Examinations for both Students and Articled Clerks in the Junior Class shall be abolished, and in lieu thereof, Students and Clerks shall be admitted under section 4, sub-section 7 of the rules.

8. (*a*) Personal attendance of any applicant for admission as a Student or Clerk, shall be dispensed with.

9. The Intermediate Examinations shall take place at the close of the school course for the first and second terms of the course. The examination on the work of the third term of the course shall be taken as part of the examination for Call to the Bar and admission as Solicitors.

10. The Principal of the Law School shall be a Barrister who has been called not less than ten years. His salary shall be $3,500 a year, and he should devote the bulk of his time to the duties of his office, including the supervision and general direction of the School.

11. There shall be two Lecturers who shall be paid salaries of $800 for each year.

12. There shall be two Examiners who shall be paid salaries of $500 for each year.

13. The Student's fee shall be $10 in advance for each term.

Ordered, that the Resolutions of this day on the subject of the Law School be printed and distributed; and that they be made the first order of the day for the next meeting of Convocation, when each clause shall be open for reconsideration.

Ordered, that Convocation, when it is adjourned, stands adjourned to Friday, 4th January, 1889.

The petition of J. W. Coe was read, and the draft affidavit of G. E. Watterworth not having been sworn, was ordered to stand over.

Convocation adjourned.

J. K. KERR, *Chairman Committee on Journals.*

HAMILTON LAW ASSOCIATION.

THE Trustees beg to present their Ninth Annual Report, being for the year 1888.

The number of members at the date of the last Report was seventy ; two vacancies have occurred and one new member has been added, namely, Ralph R. Bruce, and the present membership is sixty-nine.

The annual fees to the amount of $302.50 have been paid.

The number of volumes in the Library is about 1,963, exclusive of Sessional Reports and papers, of which 160 were added during the year. The following periodicals are received, namely :—*The Law Times* (English), *The Solicitors Journal, The Albany Law Journal, The Canada Law Journal, The Canadian Law Times.*

The Treasurer's Report is submitted herewith, giving detailed statement of the receipts and expenditures and of the liabilities and assets of the Association, and the same is also in the form required by the Law Society.

The Trustees were successful in obtaining from the Law Society a loan of $1,000, which is re-payable in ten yearly instalments of $100 each without interest ; this sum has been partly expended in reports and the addition will no doubt prove a very useful one.

The Irish Law Reports and the Weekly Reporter, together with the Railway and Canal Cases and Privy Council Reports, will now be on the shelves of the Library, and further purchases will be made very shortly.

Out of the proceeds of this loan the indebtedness of the Association referred to in the last Annual Report and amounting to $547.76, has been paid, so that the indebtedness of the Association is now represented by the $1,000 owing to the Law Society.

The Trustees desire to call attention to the fact that the Barristers' Room is continually used during the Sittings of Court by litigants and witnesses ; a witness room is already provided, and the Trustees think that some action should be taken to preserve the Barristers' Room for the use of the members of the profession only.

The Consolidated Rules of Practice have been published and are now in force ; the consolidation and revision of all the existing rules have been a work of very considerable labor and one which seems to meet with the general approbation of the profession. No doubt some improvement can be made in the existing Rules, but the desirability of having a general consolidation was pointed out by this Association last year.

The re-organization of the Law School has received a considerable amount of attention during the current year, and a final report is shortly expected.

The Trustees felt that it would be very detrimental to the interests of the

Law Society to abandon their rights of examination. The Law School in its present shape can be rendered much more efficient, and the Trustees hope that the steps which have been taken in that direction may have the desired effect.

The opinions of the various County Associations throughout the Province have been noticeably felt in connection with the deliberations on the consolidation of the Rules and the re-organization of the Law School, and the Trustees consider that it is a matter of congratulation to the profession that questions of importance to the Bar now receive such general consideration.

Hamilton, 7th January, 1889.

E. E. KITTSON, *Secretary.*
EDWARD MARTIN, *President.*

Correspondence.

EDITOR OF THE CANADA LAW JOURNAL:

Sir,—At the last sittings of the Division Court here, a case involving some interesting points in municipal law was decided.

As neither the English nor our own reports, so far as could be discovered, contain any similar case, and being unable to assent to the views taken by the learned trial Judge, the writer ventures to state, shortly, the facts of the case, in the hope that additional light may be thrown upon the law it involves, by some of your subscribers.

In the year 1874, certain private persons subscribed and paid for the building of a two-plank sidewalk on a public street within the corporate limits of this town; the then Town Council being unwilling to be at more than the expense of grading the ground for the walk, which was accordingly done by them. After the lapse of several years, the corporation put down a third plank on a portion of the walk, and, from time to time, made certain repairs thereto, until last year, when upon the complaint of some of the citizens that the sidewalk was in a dangerous condition, it was by the authority of the Town Council taken up, and subsequently that portion of the plank which remained good was cut up and utilized in the construction of sidewalks upon other streets in the town.

Whereupon several of the subscribers more particularly interested, being residents upon the street whence the walk was removed, instituted the present action, on behalf of themselves and all the other subscribers, against the municipal corporation, claiming damages for the materials (plank) that had thus been converted, and for the loss of the use of the sidewalk.

It was in evidence that the parties' plaintiff had paid some $120 for the materials and the construction of the walk, and that it was laid down under their sole control and supervision; that, at the time it was taken up, it could

have been put in a fair state of repair for about $25; that the servants of the corporation were forbidden to remove the materials by one of the plaintiffs; and as special grievance for the bringing of the suit, it was shown that the plaintiffs, or some one of them, had been left "to take the road for it"—no substitute for the walk removed being given.

Counsel for the defendants objected that the plaintiffs could not show a right of property in the walk—that it belonged to the town. Plaintiff's counsel contended that it was a case of common law dedication—that the corporation must be held to be trustess of the walk for the plaintiffs in particular, and the public in general, to be used upon the street on which it was originally placed; that at most the corporation only obtained an easement in the walk, and that, so soon as it was misappropriated by them, and it became impossible (as in this case) to apply it to the use for which it was intended, the property in and the right to the possession of the materials that were of any value reverted to the donors, and the plaintiffs were justified in sueing, as well for the conversion of the materials, as the loss of the use of the sidewalk.

Dillon on Municipal Corporations was cited as an authority. It was admitted that such were the rules regarding the dedication of *real* property, but His Honor held they would not apply to *personal* property, and sustained the defendants' contention, holding that the corporation might have removed the walk and converted the materials to their own use, at any time after it was placed there.

The query is, "Have the plaintiffs any redress, if not in an action in this form?"

C. W. PLAXTON.

BARRIE, *Jan'y 18th, 1889.*

DIARY FOR FEBRUARY.

1. Fri.....County Court Non-Jury Sittings in York. Sir Edw. Coke born 1552.
4. Mon ....Hilary Term commences. High Court of Justice Sittings begin.
5. Tue ....Maritime Court sits. W. H. Draper, 2nd C. J. of C. P., 1856.
10. Sun ....*Fifth Sunday after Epiphany.* Canada ceded to G. B. 1763. Union of U. and L. C. 1841.
11. Mon ....T. Robertson appointed to Chy Div. 1887.
16. Sat.....Hilary Term and High Court Justice Sittings end. Last day for notices for call for Easter Term.
17. Sun ....*Septuagesima Sunday.*
19. Tue ....Supreme Court of Canada sits.
21. Thur ...Chancery Division High Court of Justice sits.
24. Sun ....*Sexagesima Sunday. St. Matthias.*

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

[Dec. 15th, 1888

LONGUEUIL NAVIGATION CO. *v.* THE CORPORATION OF THE CITY OF MONTREAL.

39 V.c. 52 (P.Q.)—Constitutionality of By-law—Ultra vires—Taxation of ferry boats—Jurisdiction of harbor commissioners—Injunction.

By 39 Vic. ch. 52, sec. the city of Montreal is authorized to impose an annual tax on "ferrymen or steamboat ferries." Under the authority of the said statute the corporation of the city of Montreal passed a by-law imposing an annual tax of $200 on the proprietor or proprietors of each and every steamboat ferry conveying to Montreal for hire travellers from any place not more than nine miles distant from the same, and obtained from the Recorder's Court for the city of Montreal a warrant of distress to levy upon the appellant company the said tax of $200 for each steamboat employed by them during the year as ferry boats between Longueuil and Montreal. In an action brought by the apellant company, claiming that the Provincial statute was *ultra vires* of the Provincial legislature, and that the by-law was *ultra vires* of the corporation, and asking for an injunction, it was:

Held, (1), affirming the judgment of the court below, that the Provincial legislature was *intra vires*.

(2) Reversing the judgment of the court below, that the by-law was *ultra vires*, as the words used in the statute only authorize a single tax on the owner of each ferry, irrespective of the number of boats or vessels by means of which the ferry should be worked.

(3) Affirming the judgment of the court below, that the jurisdiction of the harbor commissioners of Montreal within certain limits does not exclude the right of the city to tax and control ferries within such limits.

JOILETTE ELECTION CASE—ELECTION PETITION.

Commencement of trial—Order of judge staying proceedings during session of Parliament—Power to adjourn recriminatory charges—Sections 32, 31, ss. 4, 33, ss. 2, 35, Ch. 9, 49 Vic.—Bribery by agent.

Where the proceedings for the commencement of the trial of an election petition have been stayed during a session of Parliament by an order of a judge, such trial, if commenced within six months from the date of the presentation of the petition (the session of Parliament being excluded in the computation of time), is a valid trial and within section 33, ch. 9, 49 Vic.

After the trial has been commenced, the trial judge may adjourn the case from time to time, as to him seems convenient.

The judge at the trial of the election petition against the return of the sitting member, cannot proceed to adjudicate upon recriminatory charges against the defeated candidate when the claim to the seat for such candidate has been abandoned by the petitioners.

An act of bribery committed by an agent of the sitting member, who has been cautioned by him to comply strictly with the law, will avoid the election.

Appeal dismissed with costs.

Cornellier, Q.C., and *Ferguson* for appellants.

Choquette, for respondent.

[Dec. 15, 1888.

FOOT *v.* FOOT.

Will—Absolute bequest—Subsequent restrictions—Effect of repugnancy.

A will contained the following clause:—"I order and direct that the whole balance of proceeds of the estate be divided into twelve equal parts, five of which I give and devise to (C.M.), four of which I give and devise to (A.E.F.) But in no case shall any creditor of either of my

children or any husband of either of my children, daughters (C.M. and A.E.F.), have any claim or demand upon the said executrices, etc., but their respective shares shall be kept and the interests, rents and profits thereof shall be paid and allowed to them annually.

In an action by C.M. and A.E.F. to have the said shares paid over to them, untrammelled by any trust, they claiming that the absolute bequest could not be cut down by doubtful words or by implication, and that the restriction as to claims of husbands and creditors was repugnant and illegal:

Held, affirming the judgment of the court below (20 N.S. Rep. 71), that the clear intention of the testator was that the principal of the said devise should be retained by the executors and only the rents, etc., paid to the devisees during their lives.

Appeal dismissed with costs.

Henry, *Ritchie* and *Weston*, for appellants.

Graham, *Tupper* and *Parker*, for respondents.

Dec. 15, 1888.

ROBERTSON *v.* PUGH.

Marine insurance—Warranty as to date of sailing—Limitation of action—Proof of loss—Protest—Inaccurate statement in.

A policy on the hull of a vessel contained this clause:—"Warranted to sail not later than 3rd Dec., 1882." And that on the freight the following:—"Warranted to sail from Charlottetown not later than 3rd Dec., 1882." The vessel left the wharf at Charlottetown on Dec. 3rd, but meeting with bad weather she came to anchor some two or three miles from the wharf, but within the harbor of the port, and proceeded on her voyage on Dec. 4.

Held, affirming the judgment of the court below (20 N.S. Rep. 15), that there was a compliance with the warranty in the policy on the hull, but not with that in the policy on freight.

An action on a marine policy was prescribed to twelve months from claim for loss or damage being deposited at the office of the assurers. The vessel being lost, a protest was deposited at the office of the insurers, which stated the voyage to have commenced at a date later than that warranted by the policy. Subsequently the master who had signed the protest deposited with the insurers a declaration stating that the vessel had sailed at a date within the policy, and that he had misstated the date in the protest through ignorance of the language of the country in which it was made. An action was brought on the policy within 12 months from the depositing of the amended statement, but more than 12 months from the service of the protest.

Held, also, affirming the judgment of the court below, that the protest was a claim for loss or damage within the meaning of the condition in the policy, and the action was too late.

Appeal dismissed with costs.

Henry, *Ritchie*, and *Weston*, for appellants.

Graham, *Tupper*, *Borden* and *Parker*, for respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

DONOVAN *v.* HAGAN.

Assessment Act—R.S.O. 1877, *ch.* 180, *secs*, 155, 156, 114, 129, 130, 131—*Tax sale, invalidity of—Limitation of time for impeaching—Payment of taxes—Resident and non-resident roll—Distress for payment of taxes.*

The two years limited by section 156 R.S.O., ch. 180, for impeaching a tax sale, runs from the time of making the tax deed, not from that of the auction sale.

The word *sale* in that section can be properly understood only in the sense of *conveyance.*

Hutchison v. *Callier*, 27 C.P. 249, *Church* v. *Fruton* 28 C.P. 204, approved of. The contrary view expressed in *Smith* v. *Midland* 4 O.R. 498, *Lyttle* v. *Broddy* 10 O.R. 530, *Claxton* v. *Shibley* 10 O.R. 295; and *Deverill* v. *Coe* 11 O.R. 222, dissented from.

Unoccupied land divided into lots was assessed for the year 1879 and entered in the non-resident division of the assessment roll, but instead of being assessed by the numbers and names of the lots alone, separately valued and without the name of the owner, it was

entered with the name of the owner prefixed and valued *en bloc*.

The taxes assessed against the whole, together with the name of the person taxed, were entered on the collector's roll for the year, instead of being entered on the non-resident tax roll and transmitted to the county treasurer. The owner became also the occupant of the lands, before the delivery to the collector of the collector's roll for 1879, and he paid the taxes so assessed to the collector in that year. The collector, notwithstanding, returned them to the clerk as non-resident taxes unpaid, and the township clerk returned them to the county treasurer in a "list of non-resident taxes returned from the collector's roll" and they were so entered in the treasurer's books. In the treasurer's list of land liable to be sold for arrears of taxes in 1882 sent to the township clerk, the land in question was entered charged with the taxes of 1879. The land had in the meantime been regularly assessed as occupied land for the years 1880, 1881 and 1882, but the assessor neglected to give notice to the occupant that it was liable to be sold for the arrears of 1879, and the township clerk omitted to include it, as he should have done, in the return made by him to the county treasurer, pursuant to section 111, in the list of non-resident lands which appeared by the assessment roll of 1882 to have become occupied.

The land was accordingly sold in December, 1882, for the taxes of 1879—the owner having continued in occupation and being ignorant of the sale or that the taxes were alleged to be in arrear:

Held, (1) that the taxes having been entered in the collector's roll with the name of the person assessed, the payment to the collector was valid, and consequently that there were no taxes in arrear for which the land could lawfully be sold:

(2) The duties of the assessor and township clerk under sections 109, 110 and 111, are imperative and conditional to the validity of a tax sale, and are not directory merely.

The spirit and true effect of section 130 is that lands which have been occupied and on which there is distress sufficient to satisfy the the taxes, are not to be sold, [BURTON J. A. dissenting on this point.]

Per PATTERSON J. A, *semble*, under the circumstances in evidence, the sale had not been properly conducted and therefore the land had not been sold in pursuance of and under the authority of the Act so as to give operation to section 155.

The judgment of FERGUSON J. affirmed,

[February 8, 1888.

ST. DENIS *v.* BAXTER.

Insufficient findings of jury—New trial—Costs.

The judgment of the Chancery Division reported 13 O.R. 41 was reversed and judgment directed to be entered for the plaintiff on the findings of the jury for $100 with county court costs; unless the defendants elected within a time to be named to take a new trial [HAGARTY C. J.O. dissenting].

Per HAGARTY C.J.O. There had been a miscarriage at the trial: Neither party was entitled to judgment on the findings of the jury and there should be a new trial.

BATE *v.* CANADIAN PACIFIC RAILWAY.

Railway—Negligence—Return ticket at reduced rate—Condition limiting liability.

The plaintiff, with her father and brother, went some hours before the departure of the train on which she was a passenger, to a ticket office of the defendants in O., in order to procure a ticket to W. and return. The only kind of return ticket issued on the route by the defendants was called a land-seeker's ticket, for which thirty dollars less than the fare each way separately was charged. These tickets were not transferable, and were subject to a number of conditions printed on them, among which was one limiting the baggage liability to wearing apparel not exceeding one hundred dollars in value; and another condition required the signature of the passenger to the ticket for the purpose of identification and to prevent its transfer. The plaintiff's brother purchased the ticket for her, and at his request the time for using it was extended beyond the time limited by the ticket. The defendants' agent then asked for and obtained plaintiff's signature to the ticket, by which she agreed, in consideration of the reduced rate, to all its provisions, explaining to her that it was for the purpose of identification. The plaintiff did not read the

ticket, having sore eyes at the time, and the agent did not read or explain the conditions to her further than by mentioning that she alone could use it.

On the trip to W., an accident happened to the road-bed of the defendants' railway by reason of which the train was over-turned, and the plaintiff's baggage, valued at over one thousand dollars, caught fire and was destroyed. The railway had been constructed by the government and transferred to defendants. There were no indications before the accident of any defect in the road-bed.

In an action for damages for such loss the jury found a verdict for the full amount of the alleged value, which on application to the Divisional Court was set aside [ROSE, J., dissenting] and the action dismissed with costs. On appeal to this Court it was

Held, [by the majority of the Court] affirming the judgment of the Court below, that there was no evidence of any negligence with which the defendants were chargeable.

Held, also, [BURTON, J. A., dissenting,] that, whether or not the plaintiff signed the ticket or informed herself of its contents, it embodied the terms and conditions on which alone the defendants contracted to carry her and her baggage.

Per BURTON J. A.—The delivery of the ticket with any condition, by itself amounted only to a proposal to carry on certain terms, and until brought to the notice of the party intended to be bound was not a contract.

BULL *v.* THE NORTH BRITISH CANADIAN INVESTMENT CO., AND THE IMPERIAL FIRE INSURANCE CO.

Fire insurance—Mortgagor and mortgagee—Subrogation clause—4th statutory condition—Assignment by way of mortgage—Proofs of loss—Waiver.

The right of an insurance company to be subrogated to the mortgage rights of the mortgagee in the case of a policy of insurance containing the usual subrogation clause referred to below, depends upon whether they have a good defence against the claim of the mortgagor, who, as between himself and the insurance company, is the party insured.

Premium Securities Company v. *The Canada Fire and Marine Insurance Co.*, 10 R. 494, observed upon.

The fourth statutory condition provides if the property insured is assigned without the written permission of the company, the policy shall be avoided:

Held, that the assignment by this condition is one by which the assignor divests himself of all title and interest. The condition is directed against a change of title, not the creation of an incumbrance, and therefore a mortgage by the person named is not a breach of the condition. *Sands* v. *The Standard Insurance Co.*, 26 Gr. 113, 27 Gr. 167, approved.

Held, also, that an agreement for sale by the mortgagees under their power of sale which was never carried out by conveyance was not within the conditions.

After the loss the insurance company received certain proofs of loss from the mortgagees. They made no objections to them for many months after, and gave no notice that any further proofs were required. When making payment of the loss they alleged that they were entitled to be subrogated to the rights of the mortgagees, and that they objected to recognize any claim on the policy by the mortgagor, by reason of non-compliance with the statutory condition as to proof of loss.

Held, that they must be taken to have dealt with the mortgagees as agents of the mortgagor, and that they had waived further proofs of loss, and that the payment enured to the benefit of the latter.

Judgment of the Court below affirmed.

HALL *v.* FARQUHARSON.

Tax sale—Sale honestly and fairly conducted—Sale for more than was due—R.S.O. ch .180, sections 137, 155—Double assessment—Identity of parcel sold with that taxed—Payment of taxes—Statute labor.

Plaintiff was the owner of a group of small islands in Lake Rosseau, in the township of Medora, containing in all less than 50 acres. The island in question was patented to one Pape by the description of Island D. Plaintiff purchased it from Pape, called it by the fancy name of Oak Island, and built a house and made other improvements thereon, and resided there for some months in each year.

The assessor having been erroneously informed that Pape was the owner of an island in Lake Rosseau called D., put down Island D. in the non-resident division of the assessment roll with the name "Robert T. Pape." This was done to distinguish it from another Island D. in the same lake and township. He did not know that this Island D. was one of the group belonging to Hall, though he knew that Hall was putting improvements on one of the islands, which was, in fact, Island D. or Oak Island. He supposed that the name of the improved island was Flora, and this was the name of one of Hall's Islands, a small rock on which there were no improvements. The improved island was the one meant to be assessed and actually assessed, though under a wrong name. The taxes so assessed were actually paid. In 1883, the Island D. was sold for arrears of taxes for the years 1879, 1880, 1881 and 1882. The purchase money was $1.00, although the value with the improvements was about $1,000, no inquiry having been made as to its value, and the township officials having apparently taken no pains to acquire any information about it beyond what appeared on the assessment roll:

Held, [affirming the judgment of the Chancery Division] that Island D. being identified as that intended to be assessed and being that on which the improvements had been made, the owner was not affected by the mistake of the assessor in describing it as Flora Island; and that the taxes having been duly paid the sale was void.

Semble per HAGARTY, C.J.O., PATTERSON and OSLER J. J. A., that the sale would also be void as not having been under the circumstances openly and fairly conducted within the meaning of section 155.

The duty of the county treasurer in reference to tax sales observed upon.

Hall v. *Hall* 2 E. and A. 569; *Haisley* v. *Somers*, 13 O.R. 605 considered.

Semble, a sale for more taxes than are actually due cannot be supported under section 137, where section 155 does not apply, in consequence of the sale not having been openly and fairly conducted.

Yokkam v. *Hall* 13 Gr. 235, *Edinburgh Life Ins. Co.* v. *Ferguson* 32 U.C.R. 253, followed.

Semble, that Island D. or Oak Island should have been assessed on the resident instead of the non-resident division of the assessment roll.

Per PATTERSON, J.A., observations as to assessment of several parcels of non-resident land less than 200 acres for statute labor.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Full Court.] [Dec. 22.

REGINA *v.* SMITH.

Canada Temperance Act—R.S.C. c. 106, *s.* 100, *construction of "Not less than* $50"*—Penalty —Powers of magistrate.*

The words "not less than $50" and "not less than $100" in the Canada Temperance Act, R.S.C. c. 106, s. 100, should be construed as "$50 and no less" and "$100 and no less"; and a summary conviction by a police magistrate for a first offence against the Act was quashed because the penalty imposed, $75, was beyond the jurisdiction of the magistrate; FALCONBRIDGE, J., dissenting.

Regina v. *Cameron*, 15 O.R. 115, not followed.

Stimpson qui tam, v. *Pond*, 2 Curtis (Mass.) 502, referred to and approved.

S. A. Jones, for the defendant.

Delamere, for the complainant.

Chancery Division.

Full Court] [Dec. 15, 1888.

JONES *v.* MCGRATH.

Deed of land—Husband and wife—Consideration —49 Vic. c. 20, *s.* 6*—R.S.O.* 1887, *c.* 100 *s.* 6.

An action for the recovery of land. One of the deeds in the chain of title was a conveyance from the defendant direct to his wife, dated Oct. 18, 1884, which the defendant contended was a void conveyance. It purported to be for the consideration of $100, the receipt being acknowledged in the usual way in the body of the deed and in the margin. The plaintiff got his conveyance from the wife of the defendant on March 28, 1887, and therefore after the enactment of 49 Vic. c. 20, s. 6, which makes a receipt for consideration

money in the body of a conveyance sufficient evidence to an innocent purchaser, such as the plaintiff was in this case, of the payment thereof.

Held, that under this enactment the consideration of $100 must, as against the plaintiff, be held to have been truly paid, and this being so, the conveyance from the husband to the wife was good, as the Court would declare a trust in favor of the grantee who had paid the consideration.

English for the plaintiff.

McGregor for the defendant.

Full Court.] [Dec. 15, 1888.

CLARKE *v.* FREEHOLD LOAN & SAVINGS CO.

Mortgage—Right of payment off to obtain partial releases—Assignee of equity of redemption—Running with the land.

A mortgage on five stores, and expressed to be for $10,500, contained a provision that on payment of $2,500, the mortgagees would release the easterly store mortgaged, and any one or more of the other four stores on payment of $2,000 each, at any time on receiving a bonus of three months interest on the sum so paid.

Held, that the benefit of this clause passed to the assignee of the equity of redemption, who was entitled to enforce it.

It appeared that the whole $10,500 had not been advanced.

Held, that the amount required to be paid to entitle the assignee of the equity of redemption to obtain a release of any of the stores must be abated proportionately.

S. R. Clarke, plaintiff in person.

Hoyles, for the defendants.

Full Court.] [Dec. 14, 1888.

RE PUBLIC SCHOOL BOARD OF TUCKERSMITH.

Case submitted by Minister of Education under s. 237 of the Public Schools Act.

Held, that the plain meaning of s. 63 of the Public Schools Act, R.S.O. 1887, c. 225, is that after the township public school board has existed for five years at least, there may be at any time the submission of a by-law for the repeal of the by-law under which that board was established, upon the presentation of a properly signed petition therefor. The by-law establishing the township board may be attacked with a view to its repeal again and again, so long as the agitation against it subsists.

Moss, Q.C., for certain ratepayers.

W. Blake, for the township council.

Full Court.] [Dec. 15, 1888.

JONES *v.* DALE.

Specific performance—Written contract—Omitted term—He who comes into equity must do equity.

In an action for specific performance of an agreement for the sale of lands, it appeared that the parties intentionally omitted from the writing a part of the agreement, as to the tenure of which both parties agreed; and the defendant asked to have this inserted in the judgment for specific performance, but the plaintiff objected.

Held, that on the principle that he who comes into equity must do equity, it was proper that the omitted portion of the agreement should be inserted as claimed.

Where both parties concur, in an action such as this for specific performance, that there is a material ingredient of the transaction left unexpressed because one party chose to trust the other without writing, it is eminently proper for the Court to deal with the whole contract and not to pass over any part for technical reasons.

G. H Watson, for appellant.

McGillivray, *contra*.

Full Court.] [Jan. 8, 1889.

GIBBONS *v.* WILSON.

Debtor and Creditor—Preference—Principal and agent—R.S.O. c. 124, s. 3—Chattel mortgage—Assignment for Creditors.

C. being insolvent, was taken by one of his creditors to S., a solicitor, and there it was arranged that S. should find some one who would lend C. $600 on his stock in trade, S. at the same time taking from C. a written authority to pay the claim of the said creditor in full out of the moneys advanced. S. accordingly got one W. to lend the money on chattel mortgage of the stock in trade, W., however, knowing nothing of C's circum-

stances or of why the money was wanted, or how it was to be applied. Out of the money S. paid off the creditor in question in full. C. afterwards made an assignment for the benefit of his creditors to G., who brought this action to set aside the chattel mortgage.

Held, that the action must be dismissed, for the mortgage was made in consideration of a present *bona fide* advance of money within the meaning of R.S.O. c. 124, s. 3. It could not be said that the "effect of the mortgage" was to prefer the creditor, for this was the effect solely of the act of S., acting apparently altogether for another principal.

The rule is that the fraudulent act of an agent does not bind the principal unless it is done for the benefit of the principal, unless the principal knows of or assents to it, or takes an advantage by reason of it.

Moss, Q.C., for the plaintiff.

Walker, for the defendant.

Boyd C.] [Jan. 9, 1889.

RE PRITTIE *v.* CRAWFORD.

Vendor and purchaser act, R.S.O. c. 112—Equitable interest in land—Effect of fi.fa. lands in Sheriff's hands.

R.W.P. became the purchaser of certain lands under an agreement in writing, but being unable to carry out the agreement he assigned all his interest in it to J.P. At the date of the agreement there were writs of *fi. fa.* lands in the Sheriff's hands, which were subsequently duly renewed and were not paid or satisfied. In an application under the Vendor and Purchaser Act, in which J.P. was making title, it was

Held, that the executions did not bind R.W.P's. interest under the agreement.

W. N. Miller, Q.C., for the purchaser.

D. Macdonald, for the vendor.

Practice.

FERGUSON, J.] [Jan. 4th, 1889.

In re HIME *and* LEDLEY.

Priorities—Execution creditor—Mortgagee—Removal of fi.-fa. lands for renewal—Neglect to replace—Mistake—Time.

Rule 894, providing for the renewal of writs of execution, necessarily intends the removal in each case of the writ out of the actual possession of the Sheriff for the purposes of such renewal. This is an exception to the general rule, and the time during which a writ may for the purposes of renewal be kept out of the hands of the Sheriff without interference with the right of priority is commensurate with the time reasonably necessary to effect the renewal; but the exception cannot be made to extend so as to cover mistakes, never so honestly made, the consequence of which is a failure to replace the writ in the hands of the Sheriff for so long a period as six or seven months.

And where H. placed a writ of fi.-fa. lands in the hands of a Sheriff in November, 1883, and renewed it from year to year till October, 1886, when he removed it for the purposes of renewal only, and by mistake did not replace it till April, 1887;

Held, that he had lost his priority over L., a mortgagee, whose mortgage was registered against the land of the execution debtor in July, 1885.

Aylesworth, for Hime.

Carson, for Ledley.

C. P. Div'l. Ct.] [Jan. 7, 1889.

WILSON *v.* MCDONALD

Foreign commission—Evidence of a defendant—Application of co-defendant—Material on application—New material on appeal—Costs.

The Court will not hesitate to make an order for a foreign commission for the examination of a witness who is abroad, and whose presence cannot be procured for the purpose of giving evidence in Court, because such witness is a co-plaintiff or co-defendant of the person applying. The Divisional Court, on appeal, admitted evidence which was not formally before the Master or Judge in Chambers below, and being satisfied that the defendant McD. could not be induced to return from abroad to give evidence, and that his evidence was important to the defendant C. were of opinion that the latter was entitled to a commission to examine McD. abroad; but gave no costs of the appeal.

Dartnell, Co.J. Whitby.] [Chy. Div.

RE WOON, WOON *v.* WOON.

Practice—Sale—Vendor tendering—Right to withdraw tender.

A plaintiff having conduct of the proceedings, is precluded from tendering for the lands affected by the judgment to the same extent and for the same reasons that prohibits his bidding at a sale of the same lands by auction.

A person tendering for lands to be sold at a judicial sale can withdraw his tender at any time before acceptance.

I refer to *Re Follis, Kilbourn* v. *Cultis* 6 P.R. 160, *O'Connor* v. *Woodward* 6 P.R. 223, *Crawford* v. *Boyd* 6 P.R. 278, *Dickey* v. *Heron* 1 chy. ch. 149, *McRoberts* v. *Durie* 1 chy. ch. 211, *McDonald* v. *Gordon*, 2 chy. ch. 125.

DIVISION COURTS.

DARTNELL, Co. J., Whitby.]

COLTON *v.* SCHELL.

Garnishee practice—Authority of solicitors to consent.

There is no practice or rule which will authorize the ignoring of an order by consent of solicitors or agents, without disclosing the facts upon which such order is asked for. Such authority to consent is confined to the time or hearing of any cause, matter or proceeding.

MUNICIPAL CASES.

DARTNELL, Co. J.] [Whitby, Jan. 11.

In re THE DITCHES AND WATERCOURSES ACT.

Furness, appellant.

Gilchrist, respondent.

Ditches and watercoursces act—Inequitable and irregular award—duty of clerk and engineer—Alternative route—Amending award.

The failure of agreement is a condition precedent to taking action under the Act.

It is the duty of the clerk and engineer to examine and satisfy themselves before acting that the requirements of the Act have been strictly complied with.

The engineer is not obliged to adopt the route or course of the drain asked for, but can deviate therefrom or lay out a different or alternative route, and may notify such persons as may be interested or affected by such new route, and the persons so added will be covered by the award as if originally notified.

An award founded upon proceedings wholly irregular cannot be amended.

Appointments to Office.

SHERIFF.

Welland.

James Smith, of Willoughby, to be Sheriff of the County of Welland, *vice* George J. Duncan, deceased.

REGISTRARS OF DEEDS.

Elgin.

J. H. Coyne, of St. Thomas, to be Registrar of Deeds for the County of Elgin, *vice* A. McLachlin, deceased.

Northumberland.

A. E. Mallory, of Warkworth, to be Registrar of Deeds for the East Riding of Northumberland, *vice* J. M. Grover, deceased.

CORONERS.

Wellington.

S. M. Henry, M.D., of Harriston, to be an associate Coroner for the County of Wellington.

Kent.

P. N. Davey, M.D., of Duart, to be an associate Coroner for the County of Kent, *vice* A. Decon, M.D., left the county.

DIVISION COURT CLERKS.

Huron.

Charles Seager, of Goderich, to be Clerk of the First Division Court of the County of Huron, *vice* J. S. McDougall, deceased.

BAILIFFS.

Prescott and Russell.

Docitte Lavergne, of Cumberland, to be Bailiff of the Fifth Division Court of the united Counties of Prescott and Russell.

Wentworth.

H. A. Combs, of Saltfleet, to be Bailiff of the Fifth Division Court of the County of Wentforth, *vice* S. S. Springstead, deceased.

Carlton.

William Falls, of Huntley, to be Bailiff of the Third Division Court of the County of Carleton, *vice* John Reilley, resigned.

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WE congratulate the County of York Law Association on its success during the past year. The recommendations regarding the registry laws, contained in the annual report of the Association, which we have been compelled by pressure of other matter to hold over until our next issue, are specially deserving of the prompt and favorable consideration of the Provincial Legislature. The officers elected for the current year are:—President, Christopher Robinson, Q.C.; Vice-President, John Hoskin, Q.C.; Treasurer, Walter Barwick; Curator, E. D. Armour; Secretary, Frank Drake; Trustees, Messrs. Lash, Q.C., J. H. Macdonald, Q.C., N. G. Bigelow, Nicol Kingsmill, and W. Macdonald; Auditors, J. T. Small, Alan Cassels.

THE decision of the Chancellor in *Prittie* v. *Crawford*, to which we referred in a former issue (p. 1), was not, we are informed, a considered judgment of his lordship. The case was one in which the purchaser was anxious to complete his bargain, and the decision of the Court being asked, under the Vendors and Purchasers Act, was consequently virtually *ex parte*, because the only persons really interested adversely to the vendor were the execution creditors, and they of course were not parties to the proceedings. An off-hand judgment given under these circumstances can hardly be entitled to the same weight as one pronounced after full argument, and after due deliberation. The short point decided was that an execution against lands does not bind the interest of the debtor in lands under an agreement to purchase. We do not ourselves feel quite satisfied that this decision can be made to square with the provisions of sec. 25 of the Execution Act, which does not appear to have been brought to the learned Chancellor's attention. That section says: "Any estate, right, title or interest in lands which, under sec. 9 of the Act Respecting the Transfer of Real Property, may be conveyed or assigned by any person, *or over which he has any disposing power which he may, without the assent of any other person, exercise for his own benefit, shall be liable to seizure and sale under execution* against such person," etc., etc. This section seems to us to deal with two classes of property—first, estates and interests which can be conveyed under sec. 9 of the Act Respecting the Transfer of Real Property, viz.: "a contingent, an executory and a future interest, and a possibility coupled with an interest in land, whether the object of the gift, or limitation of such interest or possibility be, or be not, ascertained, also a right of entry, whether immediate or future, and whether vested or contingent in to or upon, land"; and, secondly, with those interests over which the debtor has any disposing power which he can exercise for his own benefit without the assent of

any other person. The interest of a purchaser in land, under an agreement to purchase, we should have thought would clearly come under the last head, and if our construction of the Execution Act is correct, it would be unsafe in practice to act upon the decision in *Prittie* v. *Crawford.*

Before concluding these remarks, we may observe that practitioners seem disposed to think that a decision under the Vendors and Purchasers Acts is a sufficient indemnity against adverse claims, and cases are not unfrequently presented to the Court with little, if any, argument, both parties being desirous that the point raised should be decided in favor of the vendor's title. We think this is a great mistake, because third parties whose rights come in question are not bound by the decision, and therefore the purchaser on all such applications, instead of being supine, should put himself in the place of the person entitled to the supposed adverse claim, and should present every argument to the Court that might reasonably be urged in a suit between hostile parties. The decision of the Court under the Vendors and Purchasers Act so obtained may prove some sort of protection, but otherwise, we fear, in many cases it will prove but a delusion and a snare.

REMEDIES OF INDIVIDUAL CREDITOR OF A PARTNER OF A FIRM.

THE branch of the law dealing with the enforcement of a judgment by a judgment creditor of a single partner in a firm in respect to an individual liability, against the interest of his debtor in the firm, is stated by Lord Justice Lindley (Law of Partnership, 5th ed., p. 362) to be in a most unsatisfactory condition, and requiring to be put on an entirely new footing. At the part of his work above referred to, Lord Justice Lindley deals at length with the mode in which a share in firm property is taken in execution for the separate debts of its owner. To sum up what he there states in words found in the recent case of *Helmore* v. *Smith*, 35 Chy. D., at p. 447: "What the sheriff has got to sell is not the share and interest of the execution debtor in the partnership, but the share and interest of the execution debtor in such of the chattels of the partnership as are seizable under *fi. fa.* The unfortunate purchaser from the sheriff has to find out what he has really had assigned to him, and that he can only do by a partnership account; there is no other mode of proceeding. That does involve practically a dissolution of the whole concern." The levy and subsequent sale to a stranger thus amounts to a dissolution: *Partridge* v. *McIntosh*, 1 Gr., at p. 54; *Flintoff* v. *Dickson*, 10 U.C.R., at p. 431; but *Helmore* v. *Smith* shows that the mere fact of the levy being made does not *ipso facto* work a dissolution. Moreover the sheriff may not take the goods out of the possession of the other partners, who have a lien on them for the satisfaction of the partnership debt: *Ovens* v. *Bull*, 1 A.R. 62; *Sanborn* v *Roger*, 21 Am. Law Reg., 799, and notes; Story's Eq. Jurisp., secs. 677, 678.

The question how far the partners of a firm who are anxious to avoid a dissolution and a winding up of the partnership, can prevent this result in the event of a judgment creditor of an individual partner for an individual liability not being satisfied out of the private estate of his judgment debtor, but seeking realization by reason of his judgment debtor's interest in the firm, does not appear to be treated of in Lord Justice Lindley's work. We have seen that if the sheriff sells to a stranger the interest of the judgment debtor in the firm chattels, this gives the purchaser a right to an account of the partnership, for it is necessary that he should have one to ascertain and realize the value of that which he has bought, and the sale to him operates as a dissolution. Now, *Helmore* v. *Smith*, 35 Chy. D., 436, shows that if the other partners, instead of letting a stranger buy, buy in at the sheriff's sale with funds of the partnership, then there is no dissolution.

In many cases, it must be remembered, the other partners would come to the Court directly the sheriff levied, and would in their own interest obtain an order dissolving the partnership, directing the sheriff to withdraw, directing the accounts to be taken, and the value of the execution debtor's interest in the property seized by the sheriff ascertained, and appointing a receiver. And in Churchill on Sheriffs, 2nd ed., p. 220, it is said that on a levy being made the partners of the execution debtor "*should*" obtain such an order, apparently overlooking the fact that there might be a case where an immediate dissolution of the firm would mean bankruptcy, owing to firm liabilities, and where consequently the judgment debtor's interest would at the time be worth nothing, and yet where, if time was allowed for the firm to continue undisturbed, there might be great likelihood of its business reviving and its again becoming solvent. In such a case the judgment creditor of the separate partner, though aware that the firm was insolvent, might yet press for a winding up in the hope that to avert catastrophe some means would be found by the other partners to pay him off.

According to American decisions, for which, however, there does not appear to be English or Canadian authority, the separate creditors may at any time after a levy by the sheriff, and before sale, file a petition against the other partners for an account of the joint business: 14 Rep. 617; Bates' Law of Partnership, sec. 928. And if the firm is solvent this would appear reasonable enough, because a purchaser at a sheriff's sale of the interest of one partner in the partnership assets must necessarily buy in the dark, since, till the accounts are taken, the value of that interest must remain unascertained.

It would, however, appear monstrous to contend that a dissolution of the firm and a winding up and taking of the account must always be decreed if a separate judgment creditor, or even his purchaser at a sheriff's sale, insists upon it, when it would mean bankruptcy to the firm, great injury to the firm creditors, and no benefit to the separate creditors. Nowhere does there seem to have been a reported case of this kind in England or Canada; but in America it appears to have been held that where an attachment or execution has been levied upon the interest of a partner in favor of his separate creditor, and an injunction has been allowed on behalf of the other partners to determine what, if any, is his

interest, an accounting *without dissolution has been granted: Cropper* v. *Coburn*, 2 Curt. C.C. 465; Bates on the Law of Partnership, sec. 916. The reason given is that otherwise any creditor of a partner could force a dissolution. This, then, appears exactly on the point, and is the only precedent found after considerable search, but is one which seems so in accordance with common sense and justice, that it may perhaps be presumed that it would be followed in other Courts.

In any event, without having made a levy under a writ, it would not seem that a separate creditor would have any *locus standi* to come to the Court and ask for an account to be taken for his benefit. The matter does not appear to be specifically dealt with by Lord Justice Lindley, but at p. 493 of his Law of Partnership (5th ed.), speaking of who has a right to have an account, he says: "If a partner's share is taken in execution, the purchaser from the sheriff is entitled to an account from the solvent partner, as is, also, the execution debtor himself." A separate creditor is not spoken of as having such a right in any event. The learned text-writer speaks as though the question of the right of a separate creditor to an account only arose on the death of a partner, *when:* "in the absence of special circumstances, they have no *locus standi* against the surviving partners, but only against the legal personal representative of the deceased partner:" *Ib.* p. 494. See also *Burn* v. *Burn*, 8 O. R., 237.

A. H. F. LEFROY.

FRAUDULENT PREFERENCES AND LEGAL ETHICS.

THE recent decision of the Chancery Divisional Court in *Gibbons* v. *Wilson*, in which judgment was given on January 8th, is one of considerable interest on account both of its practical and its ethical aspects. The case involves an account of a very simple method by which an ingenious solicitor procured payment in full to certain clients of his, who were creditors of an insolvent debtor, in spite of the statutes directed against preferences. The plan of action was this: An authority was taken from the insolvent debtor to the solicitor to procure a loan upon the debtor's stock in trade, and to pay over the moneys to be advanced to the creditors sought to be preferred; an innocent lender was then found who advanced the requisite money, which was forthwith paid over to the creditors in question. The action was by a subsequent assignee in trust for creditors to set aside the mortgage to the lender, and the Court decided that as there was a present actual *bona fide* advance of money, the mortgage was valid under R.S.O. c. 124, sec. 3. The principle on which the decision is based is that the fraudulent act of an agent (in this case, the solicitor,) does not bind the principal unless it is done for the benefit of the principal, and unless the principal knows of or assents to it, or takes an advantage by reason of it. Here the lender knew nothing of the purpose for which the loan was asked, and it was no benefit to him that the creditor in question should be preferred. One of the learned judges laments that the arm of the law is not long enough to reach such a case, and

suggests fresh legislation. In the meanwhile, the practical result of the decision seems to be to establish a simple and valid method of securing payment in full of certain creditors of an insolvent debtor to the prejudice of others.

Now, as to the ethical aspects of the case. There may have been special circumstances to explain words in the judgments condemnatory of the conduct of the solicitor who carried out this scheme, but on the general question it seems to us a matter inviting enquiry and consideration, how far a solicitor can properly go in seeking to secure a preference for his client over other creditors. The law speaks of "fraudulent" preference, but the fraudulent element in the matter is, we imagine, entirely on the side of the insolvent debtor giving the preference, not on the side of the creditor obtaining it, or of the solicitor who acts for him. No one, we should suppose, would call it fraudulent for a man to try and get his own debt paid, even though the result is not to leave enough to pay others. The condition of human life is, speaking generally, one of competition directed towards securing an advantage over others seeking to share in the same benefits at which we are aiming; and we should probably soon arrive at some startling conclusions if we started from the proposition that it is morally wrong to secure a preference for one's self or one's client, if by legally valid means it can be done. However, we do not wish to dogmatize one way or the other, but shall be glad to open our columns to discussion.

HISTORY AND MISCHIEF OF THE QUEBEC JESUIT ACT.

IT IS not often that we have occasion to comment on any legislation in the Province of Quebec. The subject of this article, although not of much technical interest, except in so far as it touches on the interesting question of escheat, is of so much importance in connection with constitutional questions affecting the whole Dominion, and necessarily, therefore, all its provinces, that it is desirable to discuss it at some length from a constitutional and historical point of view. We have nothing to do with party politics, and for this reason we refrain from discussing the much debated question as to the expediency of disallowance by the Dominion Government of provincial Acts like the Jesuit Act; our readers can form their own opinion on the subject after a careful consideration of this most important subject. As to the competency of that government to disallow such legislation, we think there can be no doubt.

Five and twenty years ago, when the Clergy Reserves of Upper Canada, held by as indefeasible a title as it was possible for any crown-granted lands to be held, were diverted from their original purpose and applied to secular objects, it was thought that the question of the state-endowment of ecclesiastical bodies was settled for ever; and among those who voted for the secularization of the reserves were the representatives of French-Canadian Roman Catholic constituencies, who, in support of the principle then established, ranged themselves side

by side with the voluntaries of the upper province. It now appears, either that the long and fierce agitation which set aside the grants of George the Third was all in vain, or else that the rule which is valid as against the endowment of a Protestant clergy by a British Monarch does not apply to the pious designs of a king who, in his zeal for the Roman Catholic faith, ordained that upon the shores of New France no Protestant should set his foot.

In the proposed endowment of the Jesuits by the recent legislation of the Province of Quebec, we find ourselves face to face with the old dispute, and under conditions which preclude the contention that the question, as it now arises, is one altogether of provincial interest, or to be settled by purely provincial considerations; and the conditions which present themselves make every objection which may be urged against religious endowments in general apply with tenfold force to this one in particular.

Into the general question we need not enter. As we stated at the outset, that question has been settled, and to justify this particular exception from the principle established, it clearly devolves upon its advocates to show upon what grounds that justification is based. This, we are bound to say, M. Mercier has done his best to accomplish. In the preamble to his bill he gives us all the evidence, and all the facts, or assumptions of fact, upon which his action rests, and it must be admitted that the address and plausibility with which he sets about his task, are worthy of the object in view.

Having by a previous Act given incorporation to the Society of Jesus, M. Mercier, in the preamble to his Act, dwells upon the "uneasiness" felt with regard to the Jesuits' estates, and this view he supports by reference to various demands which certain ecclesiastics have, from time to time, made for a settlement of the question of the ownership of the property—a property to which, as he subsequently admits, the claimants have only a *moral* right, but for which *they are entitled to compensation.* He then proceeds to clear the way by stating that "on the occasion of the settlement of this delicate question certain Protestant educational institutions will receive a fair allowance proportionate to the numerical importance of the minority in this province." Having thus provided for the possible opposition of the "Protestant minority," the astute premier goes on to overcome the hostility which, as is well known, a large part of the majority, clerical as well as lay, entertained to his proposal; and for the purpose he, the responsible minister of a British province, not only appeals to the Pope of Rome for leave to deal with a property which, according to the law of the land, had duly escheated to the Crown for want of any legal owners, but publishes *in extenso*, in the preamble of his bill, the whole correspondence between himself as Premier of Quebec, the Procurator of the Jesuits, and the "Prefect of the Sacred College of the Propaganda," who writes as directly representing the Pope. And a very remarkable correspondence it is, in spirit as well as in letter, bringing home to us more fully than anything published in the English language has hitherto done, the sort of religious and political Frankenstein which our forefathers unwittingly created at the capitulation of Quebec, and which now, in so many ways, blocks the path of progress for this Dominion.

In his first communication, M. Mercier, after asking whether His Eminence sees "any serious objection to the Government selling the property," says that the Government would "look upon the proceeds of the sale as a special deposit to be disposed of hereafter in accordance with the agreements to be entered into between the parties interested *with the sanction of the Holy See*," and then he goes on to say that "as it will *perhaps* be necessary upon this matter to consult the Legislature of the province, etc.," he wishes an immediate reply. It is quite evident that the sanction of the Holy See was much more important for the carrying out of M. Mercier's designs than that of the Legislature of the province. In reply, his Holiness the Pope graciously grants permission for the sale of the property, "upon the express condition, however, that the sum to be received be deposited and left at the *free disposal of the Holy See*." This condition was too much, even for the Quebec Premier, who insists on his previous terms. These are conceded in the next letter in the following words: "The Pope *allows the Government* to retain the proceeds of the sale as a special deposit to be disposed of hereafter with the sanction of the Holy See." In the next document quoted authority is given by His Holiness to the "fathers of the Society of Jesus" to deal in the matter directly with the Government of Quebec, leaving, however, full *liberty to the Holy See to dispose of the property as it sees fit.* These preliminaries settled, M. Mercier then addresses the procurator of the Jesuits for the purpose of fixing the basis of settlement. He is, in the first place, very particular to specify that properly authenticated evidence of the foregoing particulars is placed in his hands, and then goes on to say that, in consenting to treat, "the Government does not recognize any *civil* obligation, but merely a moral obligation"; that the compensation given shall be expended exclusively in the province; that the Society shall grant a complete concession of all property, and a renunciation of all rights, which may have belonged to the old Society; that any agreement made shall be binding only so far as *ratified by the Pope and Legislature;* that the compensation fixed shall remain as a special deposit in the hands of the Government till the pleasure of the Pope with regard to it is made known, and that upon it the Society shall, in the meantime, receive four per cent. interest; and "finally, that the statute ratifying such agreement shall contain a clause enacting that when such settlement is arrived at, the Protestant minority will receive a grant in proportion to its population in favour of its educational work."

To all of this, clause by clause, the Procurator graciously assents, till he comes to the last, when he very properly remarks that as this clause (that relating to the Protestant minority) does not touch the question at issue, he asks to be dispensed from replying thereto. Even the Procurator of the Jesuits will not accept M. Mercier's invitation to legislate for the "Protestant minority," a degree of moderation for which the said Protestant minority should be duly grateful. Upon this correspondence, in which the leader of the Government in the Province of Quebec so openly lays himself and the Legislature of Quebec at the disposal of the Holy See, comment is needless. The unconstitutionality

of the Act resulting therefrom is, however, pointed out in another place to which we refer the reader.

Then comes the settlement of the amount of compensation, which is interesting only as showing the playful fence with which the Procurator, first estimating the value of the property at two millions of dollars, and modestly saying that he will be satisfied with half that amount, finally accepts the four hundred thousand which is offered as compensation for a property which belonged, not to the Jesuits, but to the Province of Quebec. It is hard not to believe that all this was arranged beforehand so as to display the care taken by M. Mercier to protect the interests of the Province, and the extreme moderation of the Jesuits in accepting a fifth of what, according to their contention, was really their right. The remaining documents given in the preamble are purely formal, and inserted in the bill merely to show that His Holiness and the Society of Jesus had really given their assent to the agreement.

The historical facts relating to this matter are briefly as follows: For more than a century prior to the conquest of New France the Society of the Jesuits had been established there, and had undertaken two great works—the conversion of the Indians, and the education of the people. To enable them to carry on these undertakings they had become endowed with certain lands derived from three sources: Grants from the Crown; gifts from private individuals; and purchases made from various funds at their disposal. All these grants and gifts were expressly made in trust for the objects already mentioned; besides which it must be remembered that, according to their vow of poverty, the Jesuits, neither individually nor collectively, could hold property for personal profit or emolument. We shall not stay to enquire how these trusts were executed. That is a matter of history, and is not pertinent to the present issue.

At the capitulation of Quebec article thirty-four provided that "all the communities and all the priests shall preserve their movables, the property and revenue of the Seigniories, and other estates which they possess in the colony, of what nature soever they be. And the same estates shall be preserved in their privileges, rights, honors and exemptions." With that regard for its plighted faith which the British Government has always maintained, this article was kept inviolate; and for fourteen years the Jesuits remained undisturbed in the possession of their properties.

But whilst under the British flag against which they had so often intrigued, and under the protection of the British Government which they had so often assailed, the Jesuits enjoyed peace, it was not so with them in the countries of Roman Catholic Europe. Two years after the conquest of Quebec they were suppressed in France, where the exposure of their constitution and method of acting, consequent upon the failure of Lavalette's commercial enterprises, made their presence intolerable. Five years later they were altogether expelled from the dominions of His Most Catholic Majesty, their properties sequestrated, their colleges closed and their teachings forbidden. In 1767 they were suppressed in Spain, the most Roman Catholic country in Europe and the land of their birth, but where their poli-

tical intrigues and social interference had set all parties against them. A year later saw them meet the same fate in Naples. Finally, in 1773, while still enjoying in New France, under a Protestant Government, that which was denied them in Old France under a Roman Catholic sovereign, Pope Clement XIV., acting at the desire of all those European Powers who had been suffering from the machinations of the Society, absolutely suppressed and abolished it. His reasons for doing so, as stated in the Bull which decreed its suppression were—the acts of its members in defiance of their own constitution, which forbade them to meddle in politics; the injury caused by their quarrels with local religious authorities, and other religious orders; their conformity to heathen usages in China and other Eastern lands; and the disturbances they had made in Roman Catholic countries, which caused the sovereigns thereof, of the same religion, to expel them from their dominions. And so the Bull goes on to say that seeing the Society had ceased to fulfil the intention of its institution, the Pope declares it necessary, for the peace of the Church, that it should be suppressed, extinguished, abolished, and abrogated forever, with all its rites, houses, colleges, schools and hospitals. Provision was further made for taking over and administering the property of the Society and for the conduct of its members.

Such, then, was the position of affairs in 1774, when the British Government, recognizing the fact that by the highest authority known to the Roman Church, and admitted by it as having absolute control, the Society had ceased to exist as a corporate or ecclesiastical body, gave instructions to the Governor-General of Canada to assume possession of its property as escheated to the Crown. In this the British Government violated no pledge—broke no contract. It simply took official notice of an event which had happened—of the demise of a society which left no heirs nor successors, as they might of the demise of an individual similarly situated. The property passed to the Crown as a matter of law, and of right. It could pass only to the Crown, whatever its ultimate destination might be, for there was no one else to receive it.

The manner in which the British Government exercised its rights was in perfect keeping with the good faith with which it had observed its treaty obligations throughout. Having assumed the property which had devolved upon it by the dissolution of the Society, it permitted those of the Jesuits who chose to remain to continue in possession till 1800, when the death of the survivor took place; and then it recognized the trusts attaching to the property, and, as far as circumstances permitted, it executed them. It received with favor the petitions of the Quebec House of Assembly, who, first in 1793, and on subsequent occasions, asked that the Jesuit estates should form a fund for the purpose of education, and finally, in 1831, Lord Goderich fully admitted the principle, and directed that the estates should be applied inviolably and exclusively for promoting education, as, in fact, they had been applied for many years previously. For that purpose the Government handed them over to the Province, in whose possession they have remained, and for whose benefit they have been used

ever since, and mainly, too, for the promotion of the Roman Catholic faith.*

Now, in view of these facts, what, we may ask, becomes of the fictions and assumptions stated in the preamble of the Act? Whence is derived the *moral* right of the present Society of Jesus to the estates forfeited by a former one, (which was dissolved, not by the judgment of any Protestant tribunal, but by that of the Pope of Rome, its superior and infallible head.) Where is the ground for compensation? M. Mercier admits that it rests on no legal right; and as the trusts attaching to the property have been carried out, where is the equitable or moral right? And how has he met the objections to his proceedings based on the principle which his predecessors helped to establish when they voted for the secularization of the Clergy Reserves? What is there in the case of the Jesuits to exempt them from the operation of that principle? Is it that their ethics are superior to those of the Church of England, whose endowments were taken from them? Is it the superior morality of their members? Is it the fact that they own no allegiance to the sovereign of these realms—that they are, in the extremest sense of the terms, foreigners and aliens, not to say enemies, to the commonwealth? Is it that on the testimony of professors of their own creed they have been everywhere political intriguers, disturbers of the public peace, destroyers of domestic happiness and domestic ties? Is it that with all their talent for organization, the self sacrifice and self devotion of individual members, their great missionary efforts (those bright pages in their history) have been failures—failures as vast as were the efforts they made? For we know that, despite the heroism and talents of a Francois Xavier, the martyrdom of a Brebeuf or a Lallemand, and of hundreds of kindred spirits whose bones lie scattered over North and South America, India, China and Japan, the sum of their work, so far as the elevation or advancement of the human race is concerned, is everywhere and always failure—failure, absolute and complete. What justification has the Premier of Quebec shown for his illegal and possibly treasonable invitation to the Pope of Rome to exercise jurisdiction over property in this Dominion? And, finally, what right has he shown to take from the Province of Quebec, either from the Roman Catholic majority or the Protestant minority, any sum of money, great or small, to endow any religious corporation at the expense of either one or the other? The property in question is the property of the whole Province, given to it, and held by it for nearly a century, for the purpose of education. To apply it, or any portion of it, to endow any religious body, is a direct robbing of the people, and especially of the Protestant minority, even though the latter are offered a bribe for their acquiescence, to be raised by a tax laid upon themselves.

* How differently might the British Government have acted had they taken into account the past history and the previous conduct of those with whom they were dealing—had they remembered the Jesuit plots against Queen Elizabeth, the Gunpowder Plot, and the incessant intrigues of later years—had they paid heed to the dark rumors which associated the Jesuits with the assassination of Henry the Fourth, the massacre of St. Bartholomew, the murder of William the Silent, and even the death of Pope Clement, by whom they had been suppressed; or even if, discarding all these as idle tales, they had judged the Society by its own maxim, the admitted rule of all its policy—"*Cum finis est licitus etiam media sunt licita*"—the frightful and horribly demoralizing principle that "the end justifies the means!"

But it is contended that this is a Provincial matter entirely within the jurisdiction of the Provincial Legislature, which has a right to incorporate, and if it pleases, to endow from its own resources, any society that it chooses, and that being so no *one* outside that Province has a right to interfere. Whether it would be right for the Dominion Government to interfere, or whether or not such interference, as a matter of policy, is desirable (matters into which we do not propose to enter), the subject is one which the public of the Dominion have clearly the right to discuss. They have the right to protest against the endowment, in any portion of the Dominion, of a purely religious body, contrary to the general policy of the Dominion. They have the right to protest against this official recognition of the secret religio-political society of the Jesuits as a body corporate, civil or ecclesiastical. They have the right to say that in no part of the Dominion should special privileges and powers be given to a society which, under the guise of religion, has pursued its own ends in defiance alike of morality and Christianity, has violated its own rules, and disregarded the laws of every country in which it has existed; which has been the instigator, if not the perpetrator, of private assassination and public massacre; which has stirred up war and rebellion among nations, and destroyed the domestic peace of families; which subverts every idea of mental and moral independence, and makes a blind and unreasoning obedience to human authority take the place of the dictates of conscience and the teaching of Scripture. They have the right to protest, also, against the Pope of Rome or any other foreign ecclesiastic, of any denomination, or any alien power whatever, civil or ecclesiastical, interfering in any way, directly or indirectly, in the affairs of this Dominion, or of any Province within it, to the subversion and undermining of the just rights and pre-eminence of our Sovereign in her own dominions, and more especially when such interference is exercised on behalf of a society which professes no allegiance to any temporal sovereign, and whose avowed aim, at the present moment, is to use every means to subvert religions which conflict with its own, and to secure that absolute supremacy in temporal and spiritual affairs for the head of the Church of Rome which the British nation has for centuries been resisting. They have the right to protest against a disloyal society, the existence of which is a menace to the integrity of the British Empire, and whose members are said to be bound by an oath to aid in extirpating the "damnable doctrines" of the Church of England, and other Protestants, solemnly renouncing all allegiance to all heretical kings and governments, and binding themselves when called on to "depose" them, and if necessary, "destroy" them. And it need not be stated here that the kingdom of Great Britain and Ireland is by its constitution a Protestant power. The Dominion of Canada is a part of that great empire, and owes allegiance to a sovereign who by the law of the land must be a Protestant.

Happily there is in this matter no issue between Protestant and Roman Catholic. By none has the mischievous and meddlesome policy of the Jesuits been so resented as by other Roman Catholic bodies whose rights it has interfered with, whose operations it has hindered, and whose independence it has subverted.

By none have its character and its principles been more fiercely assailed, and more vehemently denounced, than by men of the Roman Catholic faith. By no governments has it been so harshly dealt with, and so absolutely suppressed, as by the governments of such supremely Roman Catholic countries as Spain, France and Italy. And it is only by its success in the cause of Ultramontanism, and the destruction of the Gallican and other national churches, that it owes the favor it now enjoys. In conclusion, we venture to say, by none will the action of M. Mercier be more bitterly regretted in time to come than by the Roman Catholics of the Province of Quebec.

THE CONSTITUTIONALITY OF THE QUEBEC JESUIT ACT.

THIS Act appears to give authority to the Pope to sanction or ratify the distribution of the legislative grant of $400,000. The enacting clause provides that the money is to be payable "under the conditions mentioned in the documents" cited in the preamble. This delegation of authority to the Pope, a foreign potentate or sovereign, brings up the question whether the Act is constitutional, and also whether it infringes the express provisions of Imperial statutes prohibiting foreign potentates exercising jurisdiction in the dominions of the Crown, which are in force in Canada.

It will, we think, be conceded, apart from any provisions in Imperial statutes, that it is *ultra vires* the constitutional power of a colonial legislature to confer on or delegate to any foreign sovereign, potentate, or tribunal, lawful jurisdiction or authority to determine or ratify the distribution of the moneys or properties of the Crown, or how money grants to the subjects of the Crown, within its colonial jurisdiction, are to be distributed.

The Imperial Crown may in any proper case agree with another crown or nation to refer to a sovereign, or to arbitrators mutually agreed upon, questions affecting its belligerent or territorial rights or claims; but this regality of the Imperial Crown is not possessed, nor can it be exercised, by a colonial government or legislature. If it would be *ultra vires* of the Legislature of Ontario to delegate authority to a foreign power—say to the President of the United States—to distribute, or to ratify the distribution of public moneys legally voted (the Clergy Reserve moneys, for instance) it follows that this delegation of authority to the Pope by the Legislature of Quebec must also be *ultra vires*. What would be unconstitutional in Ontario must be equally unconstitutional in Quebec. No State of the American Union, though "sovereign" in a limited sense, can treat with foreign potentates, or give them jurisdiction to dispose of the moneys or territorial properties of the State. Nor can any provision similar to that in this Quebec Act be found in the legislation of any civilized nation.

The Imperial Parliament has from the earliest days made it a criminal offence for subjects of the Crown to procure judgments or determinations from the See of Rome or from any other foreign powers or potentates out of the realm; and

no Act can be found in the Parliamentary annals of England delegating to a foreign potentate authority to determine how grants of money to subjects of the Crown should be disposed of.

In the 25th, 27th and 38th years of Edward III., and the 13th and 16th years of Richard II., this prohibitory legislation against the Pope's jurisdiction in England commenced. The statute, 24 Henry VIII., c. 12, prohibits any foreign inhibitions, appeals, sentences, judgments or any other process, etc., from the See of Rome or any other foreign courts or potentates, and prescribes penalties against persons within the realm, *or within any of the King's dominions*, attempting to procure any such from the See of Rome or from any foreign court or potentate.

Another statute of the same year (c. 21) prohibits the King, his heirs, and successors, Kings of the realm, and all subjects of the realm, *or of the dominions of the Crown*, from suing for licenses, dispensations, compositions, faculties, grants, rescripts, *delegations*, or any other instruments in writing from the Bishop of Rome, "called the Pope," or from any person or persons having or pretending to have any authority by the same. "The King, his heirs and successors," being expressly named in the Act, the reigning Sovereign is bound by the prohibition *Coke's, Inst.* 169); and it is not within the constitutional power of a colonial legislature or governor to absolve the Crown from its provisions, or to enact or assent to any Bill violating this or any other Imperial Statute in force in the colony. The Crown can only be relieved from the prohibitions of the Act by the power that imposed them, namely, the Imperial Parliament.

But the statutes of Elizabeth are more precise and emphatic, and in express words abolish "the usurped power and jurisdiction of the Bishop of Rome, heretofore unlawfully claimed and usurped within this realm, *and other the dominions to the Queen's Majesty belonging:*" 13 Elizabeth, c. 2; 1 Elizabeth, c. 1. Neither the treaty surrendering Canada to England, nor the Quebec Act of 1774, altered these statutory prohibitions against the foreign jurisdiction of the Pope. Both granted to the French-Canadian subjects of the Crown liberty to profess the Roman Catholic religion "so far as the laws of Great Britain permit," and in "subjection to the Crown and parliament of Great Britain."

"The conditions mentioned in the documents" cited in the preamble of the Act, import into the Act the assertion that "*the Holy Father reserved to himself the right of settling the question of the Jesuits' estates in Canada*," and provide that the proceeds of sale are to be disposed of under agreements "*with the sanction of the Pope*," and that "the amount of the compensation fixed [$400,000] shall remain in the hands of the government of the province, as a special deposit, *until the Pope has ratified the said settlement and made known his wishes respecting the distribution of such amount in this country.*"

These extracts clearly show an intent to confer upon the Pope—a foreign potentate—a jurisdiction to determine how the Crown's grant of money is to be distributed in Canada. In view of the constitutional questions and statutory provisions referred to above, we are inclined to think that the question of the validity or disallowance of the Jesuit Estates Act of Quebec, has not yet been settled.

COMMENTS ON CURRENT ENGLISH DECISIONS.

TRUSTEE ACT, 1850 (13 & 14 VICT., C. 60), SS. 3, 5—APPOINTMENT OF NEW TRUSTEE IN PLACE OF LUNATIC TRUSTEE AND PERSON OUT OF JURISDICTION—VESTING ORDER.

In re Baths, 39 Chy. D., 189, was an application under the Trustee Act, 1850, for the appointment of new trustees. The trust property consisted of money lent upon a mortgage of freeholds vested in the two surviving trustees, and a sum of consols standing in their names. One of the trustees was a lunatic, and the other was resident out of the jurisdiction; and under a power in the settlement two persons were appointed new trustees in their places. Upon a petition by these two new trustees and by all the beneficiaries praying for an order reappointing the new trustees as trustees of the settlement, and vesting the trust property in them, the Court of Appeal (Cotton and Fry, L.JJ.) refused to reappoint the new trustees, but under sec. 3 of the Trustee Act, 1850, vested the lands subject to the mortgage in the new trustees, and under sec. 5 of the same Act vested the mortgage debt, and the right to call for a transfer of the consols, in the trustee of sound mind resident out of the jurisdiction, and, it appearing that he was out of the jurisdiction, vested the mortgage debt and the right to call for a transfer in the new trustees, which seems rather a circuitous process of arriving at the desired end.

STRIKING OUT STATEMENT OF CLAIM—FRIVOLOUS AND OPPRESSIVE ACTION—STATUTE OF LIMITATIONS (3 & 4 W. 4, C. 27) S 26 (R. S. O., C. III, S 31).

Lawrence v. *Norreys*, 39 Chy. D., 213, is a case which arises out of the celebrated mare's nest so well known on this continent as the "Lawrence-Townley Estate," in which untold millions are supposed to be awaiting eager and expectant heirs. This effort to recover the estates has proved abortive, having been as it were nipped in the bud by a cruel and relentless Court of Appeal. The plaintiff sued to recover the estates in question as heir-at-law of Jonathan Lawrence the younger, who was alleged to have died seized, in 1816. The plaintiff alleged that on Jonathan Lawrence's death, John Townley wrongfully took possession; that the solicitors of the deceased Jonathan, whose names were not given, knew of the address of the heir-at-law, who resided in America, and were about to communicate with him, but that John Townley dissuaded them from so doing, and procured them to deliver to him the deeds and evidences of Jonathan's title, which he destroyed, and that by reason of the premises the persons claiming under Jonathan remained ignorant until 1886, and that the fraud could not with reasonable diligence have been sooner discovered.

The plaintiff had previously commenced an action in the Queen's Bench Division to recover the same estate, in which he merely alleged his title as heir-at-law, but made no allegations of fraud to take the case out of the Statute of Limitations. The defendants had applied to strike out the statement of claim, as showing no cause of action. The plaintiffs then applied to amend by alleging

fraud. But the Queen's Bench Division refused leave to amend, and struck out the statement of claim as showing no cause of action. The plaintiff then commenced the present action, and the allegations of fraud in the present action were similar to those he had sought to introduce by amendment in the action in the Queen's Bench Division. Stirling, J., held that the inducing the solicitors to deliver up the deeds to John Townley was a concealed fraud, which would prevent the operation of the Statute of Limitations, and not being satisfied that the allegations of fraud were fictitious, he thought the action ought to be allowed to proceed. But the Court of Appeal (Cotton, Bowen & Fry, L.JJ.) took a different view of the matter, and held that the proper conclusion to be drawn from the materials before the Court was, that the allegations of fraud were made without reasonable ground, and that the statement of claim ought to be struck out and the action dismissed as an abuse of the process of the Court.

MORTGAGE—PRIORITY—NOTICE—NEGLIGENCE—POSSESSION OF TITLE DEEDS—EQUAL EQUITIES.

Union Bank of London v. *Kent*, 39 Chy. D. 238, is an illustration of the equity maxim, that where the equities are equal, priority of time prevails. A company held under a building agreement from the Corporation of London, under which separate leases of the houses were to be granted as they were built. In April, 1883, the company borrowed money from the plaintiffs, and covenanted to mortgage the houses by demise when the leases were granted, and that in the meantime the premises comprised in the building agreement should be security to the plaintiffs. The building agreement was handed to the plaintiffs, but no notice of their charge was given to the Corporation of London. In 1886, leases of two of the houses were granted by the Corporation to the company, and immediately afterwards the company deposited the leases with Janson & Co. by way of equitable mortgage. The plaintiffs claimed priority over Janson & Co., who contended that by reason of their possession of the leases and the failure of the plaintiffs to give notice to the Corporation of their claim, the plaintiffs were postponed. But it was held by Chitty, J., that the equities of both parties were equal, and that the plaintiffs being prior in point of date, were entitled to priority over Janson & Co. This decision was affirmed by the Court of Appeal (Cotton, Bowen & Fry, L.JJ.), Cotton, L.J., pointing out that notice is not necessary to perfect an equitable charge on land, and that notice not being necessary to perfect the security, the omission to give notice was not negligence on the part of the plaintiffs, even though the omission to give notice enabled the company to take possession of the houses.

DISCRETIONARY TRUST FOR MAINTENANCE—ASSIGNABLE INTEREST—DISCRETION OF TRUSTEES.

In re Coleman Henry v. *Strong*, 39 Chy. D. 443, presents some features in common with *Fiskin* v. *Brooke*, 4 App., R. 8. A testator directed his trustees after the death of his wife to apply the income of his estate "in and towards the maintenance, education and advancement of my children in such

manner as they shall seem most expedient, until the youngest of my said children attains the age of twenty-one years," and on the happening of that event he directed then to divide his estate equally among all his children then living. The testator left four children, of whom, at the death of his widow, two were minors, the youngest being in his seventh year. The trustees paid each of the adult children one fourth of the income, and applied the other two fourths for the benefit of the minors equally until 1886, when one of the adult children assigned all his interest under the will to the plaintiff, Henry. The trustees declined to pay one fourth of the income to Henry, whereupon he applied to the Court for the construction of the will. And it was held by the Court of Appeal (Cotton, Fry & Lopes, L.JJ.), affirming North, J., that none of the children had any absolute right to any part of the income prior to the attainment of twenty-one by the youngest child; but that the trustees had an absolute discretion to apply the income for the maintenance, education or advancement of all of the children as they should see fit; but whereas, North, J., held that none of the children had an assignable interest, the Court of Appeal held, that although if the trustees paid a third party to supply the child who had assigned, with goods, that that would not be property that would pass by the asignment, yet if they were to pay or deliver money or goods to him, or appropriate money or goods to be paid or delivered to him, such money or goods would pass by the assignment.

PRACTICE—FORECLOSURE—ORDER FOR POSSESSION—(C.R. 341 *a.*)

In *Keith* v. *Day*, 39 Chy. D. 452, a final order for foreclosure having been made without any direction as to the delivery of possession, the plaintiff moved for an order for delivery of possession, and it was held by the Court of Appeal that the plaintiff was entitled to the order and ought not to be put to bring a new action to recover possession.

MORTGAGOR AND MORTGAGEE—AGREEMENT FOR LEASE BY MORTGAGOR—RIGHT OF TENANT TO REDEEM.

In *Tarn* v. *Turner*, 39 Chy. D. 456, a mortgagor, without the consent or concurrence of the mortgagee, contracted in writing to grant a lease of the mortgaged premises to the plaintiff, who entered into possession under the contract, and subsequently on notice from the mortgagor, paid rent to him. The mortgagee having refused to concur in the lease to the plaintiff, the latter brought an action to redeem the mortgage. The mortgagee contended that a tenant for years had not such an interest in the equity of redemption as entitled him to redeem, and it is somewhat curious that no case could be found in the books in which the right of a tenant for years to redeem had been expressly adjudicated on; but it was held by Kekewich, J., and affirmed by the Court of Appeal (Cotton, Fry & Lopes, L.JJ.) that the tenant was entitled to redeem as being an assignee in part of the equity of redemption.

HUSBAND AND WIFE—LEGACY TO WIFE—HUSBAND'S DEBT—RETAINER—EQUITY TO A SETTLEMENT.

In re Briant, Poulter v. *Shackel*, 39 Chy. D. 471, Kay, J., determined that the wife's equity to a settlement was entitled to prevail over the right of an executor to retain out of a legacy due to the wife, a debt due by her husband to the testator's estate. The case was one that did not come within the Married Women's Property Act, 1882, which very materially modifies the right of retainer under such circumstances, if it does not altogether abolish it.

MARRIED WOMAN—GENERAL POWER OF APPOINTMENT—APPOINTED FUND HOW FAR ASSETS—MARRIED WOMEN'S PROPERTY ACT, 1882, s. 1, s.s. 4 (R.S.O. c. 132, s. 3, s s. 4).

In re Roper, Roper v. *Doncaster*, 39 Chy. D. 482, a question arose as to how far property appointed by a married woman under a general power of appointment, became assets to satisfy her debts; and it was held by Kay, J., that the property appointed would not be assets to satisfy any debts or obligations incurred before the Married Women's Property Act of 1882 came into force, because prior to that Act it had been determined in *Pike* v. *Fitzgibbon*, 17 Chy. D. 454, that the only separate estate of a married woman which could be made liable for her engagements was such as she had "at the time of contracting the debt or engagement."

SALE OF BUILDING MATERIALS—INTEREST IN LAND—STATUTE OF FRAUDS, ss. 4, 17—SPECIFIC PERFORMANCE—DAMAGES.

In *Lowery* v. *Pursell*, 39 Chy. D. 508, a contract was made for the sale of "building materials" of a house with a condition that all materials were to be cleared off the ground within two months, "after which date any materials then not cleared off will be deemed a trespass, and become forfeited, and the purchaser's right of access to the ground shall absolutely cease;" and it was held by Chitty, J., that this was a contract for the sale of an interest in land within sec. 4 of the Statute of Frauds, and owing to the absence of any sufficient description of the vendor in the contract, it was void. He also held that the contract having from lapse of time become at the hearing incapable of specific performance, the equitable doctrine of part performance as avoiding the operation of the Statute of Frauds, did not enable the plaintiff to obtain relief in damages. At p. 514 Chitty, J., draws the distinction between the cases of a sale of "building materials" where the vendor is to pull down the house and where the vendee is to do so. In the former case he seems to agree that the contract would be within sec. 17, whereas in the latter case it comes under sec. 4. The learned Judge appears to have found some difficulty in reconciling his decision with *Marshall* v. *Green*, 1 C.P.D. 35, where a sale of standing timber, to be cut by the vendee, was held not to be within the 4th section. As regards the other point, he says, on p. 519, that damages can only be given where specific performance could have been decreed, and that it was a substitute for specific performance: See, however, R.S.O. c. 44, s. 53, s.s. 9, which provides that damages may be awarded in addition to, or substitution for, specific performance.

AGREEMENT IN RESTRAINT OF TRADE.

Baker v. *Hedgecock*, 39 Chy. D. 520, was an action to restrain the defendant from violating an agreement entered into by the defendant with the plaintiff, on entering his service for the term of three years as a tailor,—not to enter the service or employ of any other person, or enter into any engagement or be concerned or interested in carrying on his own account or otherwise, "any business whatever within the distance of one mile from——during the continuance of the time or within two years of the term or within two years thereafter," without the plaintiff's consent in writing. The action was to restrain the defendant setting up as a tailor within the prescribed limit. But it was held by Chitty, J., that the agreement was void, because of the general restraint of all trade, and that effect could not be given to it by rejecting the general restraint, and limiting the agreement to the business of a tailor.

ADMINISTRATION—ANNUITY CHARGED ON REAL ESTATE TENANT FOR LIFE AND REMAINDERMAN —CORPUS.

In re Moffatt, Jones, and Mason, 39 Chy. D. 534, a testator had died entitled to certain real estate, charged with an annuity which he had covenanted to pay—a contest arose as to how this charge should be borne by the tenant for life, and remaindermen, to whom the testator had devised the property. It was held by Chitty, J. that the annuity must be capitalized and the burthen borne by the tenant for life and remaindermen, in proportion to their respective interests.

PARTNERSHIP—DISSOLUTION—RECEIVER AND MANAGER—SALE OF PARTNERSHIP BUSINESS AS GOING CONCERN.

In *Taylor* v. *Neate*, 39 Chy. D. 539, it was held by Chitty, J., that notwithstanding articles of partnership provide that on a dissolution of the firm there shall be a division of the assets, the Court has, nevertheless, jurisdiction to direct a sale of the business as a going concern, and will do so where that is the most beneficial mode of realization, and for that purpose will, after dissolution, appoint a receiver and manager until a sale of the business, for the purpose of preserving the assets by carrying into effect existing contracts, and entering into such new ones as are necessary for carrying on the business in the ordinary way, but so as not to impose by speculative dealing or otherwise, onerous liabilities on the partners.

COMPANY—DIRECTORS—MEETING—NOTICE.

In re Homer District Gold Co., 39 Chy. D. 546, application having been invited by a company for 106,000 preference shares, at a meeting of the directors, five in number, it was resolved not to allot any of the shares till 14,000 were applied for. Subsequently, two of the directors (a quorum) called a meeting to be held the same day as the notice was given, and without specifying the business to be transacted. The meeting was held at two o'clock, on a five hours' notice to two of the other directors who did not attend, of whom one did not receive his notice till the next day, and the other gave notice he could not attend till

three o'clock ; the fifth director was aboard, and no notice was sent to him. The meeting was held by the two directors who had given the notice. The previous resolution of the board of directors was rescinded, and a resolution passed that the shares applied for, about 3,000, should be allotted. On the application of some of the allottees of shares, it was held by North, J., that the meeting had not been properly called, and was irregular, and that the allotments under the resolution passed thereat were void.

MORTGAGEE IN POSSESSION—PUBLIC HOUSE—ACCOUNT—TRADE PROFIT.

White v. *City of London Brewery Co.*, 39 Chy. D. 559, was a redemption action brought by a mortgagor against a mortgagee in possession. The mortgaged premises consisted of a public house, which the mortgagees had leased with a restriction that the tenant should take beer of the mortgagee's brewing and none other. It was held by North, J., that the mortgagees must account for such additional rent as might have been got if the premises had been let without the restriction ; but not for profit made by the sale of beer to the tenant.

Reviews and Notices of Books.

THE following have been received and will be noticed hereafter :—

The Lives of the Judges of Upper Canada and Ontario. By D. B. Read, Q.C. Toronto : Rowsell & Hutcheson.

Manual of Evidence in Civil Cases. By R. E. Kingsford, M.A., L.L.B. Toronto : William Briggs.

Digest of Insurance Cases Decided in the United States in the Year 1888. By John A. Finch, Indianapolis, U.S.

Joint Stock Companies' Manual (3rd Edition.) By J. D. Warde, of the Provincial Secretary's Department. Toronto : Hunter, Rose & Co.

DIARY FOR FEBRUARY.

1. Fri.....County Court Non-Jury Sittings in York. Sir Edw. Coke born 1552.
4. Mon ....Hilary Term commences. High Court of Justice Sittings begin.
5. Tue ....Maritime Court sits. W. H. Draper, and C. J. of C. P., 1856.
10. Sun ....*Fifth Sunday after Epiphany.* Canada ceded to G. B. 1763. Union of U. and L. C. 1841.
11. Mon ....T. Robertson appointed to Chy Div. 1887.
16. Sat. ....Hilary Term and High Court Justice Sittings end. Last day for notices for call for Easter Term.
17. Sun ....*Septuagesima Sunday.*
19. Tue ....Supreme Court of Canada sits.
21. Thur. ..Chancery Division High Court of Justice sits.
24. Sun ....*Sexagesima Sunday. St. Matthias.*

Early Notes of Canadian Cases.

THE EXCHEQUER COURT OF CANADA.

BURBIDGE, J.] [June 30, 1888.

BOURGET *v.* REGINA.

Compensation and damages—Dedication of highway—Similarity of the law of England and of the Province of Quebec respecting the doctrine of dedication or destination.

This was a claim for $681, for 2,724 square feet of land in the village of Lauzon, county of Levis, P. Q., expropriated by the Crown for the purposes of the St. Charles branch of the Intercolonial Railway, and for $1,350 for damages to other lands of the claimant caused by the construction thereof.

Some time not later than the year 1877, the claimant being possessed of property in the village mentioned, divided it into forty-one lots. Through these lots a street was laid out, known by the name of Couillard street, and which connected St. Joseph street with Port Jolliette, a small cove or harbor on the River St. Lawrence. The plan of this division of the claimant's lands was duly recorded in the Registry Office for the county of Levis.

In the construction of the railway, the Crown diverted Couillard street, purchasing for that purpose one of the forty-one lots in the aforesaid division of the claimant's lands. The village corporation had never taken any steps to declare Couillard street a public way. It was, however, used as such; was open at both ends, and formed a means of communication between St. Joseph street and Port Jolliette, and work had been done and repairs made thereon under the direction of the village inspector of streets. The village council had also at one time passed a resolution for the construction of a sidewalk on the street, but nothing was done thereunder.

Upon the hearing of the claim the claimant contended that Couillard street, at the time of the expropriation, was not a highway or public road within the meaning of "The Government Railways Act" (44 Vict., c. 25), but was her private property, and that she was entitled to compensation for its expropriation.

The Crown's contention was, that at the date of the expropriation Couillard street was a highway or public road within the meaning of "The Government Railway Act" (44 Vict., c. 25), and that the Crown had satisfied the provisions of s. 5, s.s. 8, and s. 49 thereof, by substituting a convenient road in lieu of the portion of street so diverted, and that the claimant was therefore not entitled to compensation.

Held, (1) That the question was one of dedication rather than of prescription; that the evidence showed that the claimant had dedicated the street to the public, and that it was not necessary for the Crown to prove user by the public for any particular time.

(2) That the law of the Province of Quebec relating to the doctrine of dedication or destination is the same as the law of England.

Semble, That 18 Vict., c. 100, s. 41, s.s. 9. (Can.), is a temporary provision having reference to roads in existence on July 1st, 1855. which had been left open and used as such by the public without contestation during a period of ten years or upwards. See *Myrand* v. *Legare*, 6 Q.L.R. 120, and *Guy* v. *City of Montreal*, 25 L.C.J. 132.

Claim dismissed with costs.

Drouin, Q.C., and *Angers*, for Crown.

I. N. Belleau, Q.C., for claimant.

BURBIDGE, J.] [Dec. 13, 1888.

REGINA *v.* POULIOT, *et al.*

Information—Statutory defence—Demurrer—Illegality of contract—Dominion Elections Act, 1874—Crown rights—Interpretation of statutes.

This was an action at the suit of the Crown

to recover $352.20 from the defendants due upon a contract for the carriage of passengers between certain stations on the Intercolonial Railway, which is owned and operated by the Government of Canada. The defendants, by their pleas, admitted the contract and its performance by the Crown, but sought to avoid their liability by alleging (1) That the passengers were carried on *bons*, and that the action should have been brought upon such *bons*, and not upon the agreement set out in the information; (2) That the contract was for the carriage of voters to attend the nomination proceedings at an election then pending, with intent to corruptly influence such voters at such election, and was illegal and void under the provisions of secs. 100 and 122 of the Dominion Elections Act, 1874. A demurrer to these pleas was filed on behalf of the Crown.

Held, (1) That the defendants having admitted the breach of contract, their liability was not in any way affected by the fact that the passengers were carried on *bons* signed by one, and not by all, of the defendants; and that the cause of action was properly averred in the information.

(2) That the Crown is not bound by sec. 100 of "The Dominion Elections Act," 1874 (37 Vic., c. 9), which avoids every executory contract, promise or undertaking in any way referring to, arising out of, or depending upon any election under the Act, even for the payment of lawful expenses, or the doing of some lawful act; or by sec. 122 thereof, which enacts that *all persons* who have any bills, charges or claims upon any candidate for or in respect of any election, shall send in such bills, charges or claims within one month after the day of the declaration of the election to the agent of the candidate, otherwise such persons shall be barred of their right to recover such claims.

(3) That the language of the 46th clause of the 7th section of the Interpretation Act (R.S.C. c. 1), which enacts that "no provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby," is not to be construed by reading into the Act the exception to the common law rule that the Crown is not bound by a statute unless expressly mentioned, which exception is laid down by Lord Coke in the Magdalen College case (II. Rep., 74 b.), viz: "that the King is impliedly bound by statutes passed for the general good; the relief of the poor; the general advancement of learning, religion and justice; or to prevent fraud, injury or wrong."

Quære, does the clause in the Interpretation Act (R.S.C. c. 1, clause 46, s. 7) preclude the Crown from being bound by a statute in which it is included by necessary implication only?

Demurrer allowed.

O'Connor and *Hogg*, for Crown.

Gormully and *Sinclair*, for defendants.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

JENNINGS *v.* GRAND TRUNK R. W. Co.

Compensation for death caused by accident—R.S.O. (1887), *c.* 135—*Measure of damages—Life policy—Setting off insurance against damages—Administration—R.S.O. c.* 46—*R.S.O.* (1887), *c.* 50—*Express messengers—Duty to carry—Common employment.*

Although the right to recover damages for the death of a relative occasioned by the wrongful act, neglect or default of another, is, under the R.S.O. (1887) c. 135, limited to the actual pecuniary loss sustained by the plaintiff, the amount of a policy falling in by the death is not necessarily to be allowed or disallowed in computing the damages. It is merely a circumstance to be taken into consideration by the jury on reviewing the whole question of pecuniary loss or gain in consequence of the death.

The deceased was a resident of Buffalo, N.Y., being at the time of his death, which occurred in the County of Lincoln, Ont., not possessed of any real or personal property in the province, and the plaintiff (his widow) obtained letters of administration from the Surrogate Court of York.

Held, the grant of letters by the Surrogate of York was valid and effectual, and

Semble, that even if the deceased had left real or personal estate in some other county the administration obtained in York had effect over the personal estate of the deceased in all parts of Ontario until revoked: R.S.O. (1877) c. 46.

Deceased was an express messenger, and as such was being carried on the defendants' train at the time of his death, without a ticket or payment of fare, under a contract between the defendants and the express company:

Held, that the deceased being lawfully on the train the defendants were under a duty to carry him safely, and were liable for negligence in causing his death.

Held, also, that the deceased was the servant of the express company, and was not in any sense engaged in any common employment with the servants of the railway company.

CONNELL *v.* HICKOCK.

Chattel Mortgage and Bills of Sale Act—Marriage settlement of personal property—Description of property settled—Interpleader issue—Equitable title—Possession.

By an ante-nuptial settlement executed 25th March, 1885, made between James Connell of the first part, Mary Harrington (the plaintiff), his intended wife, of the second part, and one Malone of the third part, in consideration of the intended marriage, certain lands and the goods in question, consisting of horses, cows, and several articles of household furniture, described as being in and upon and around the premises and apartments used and occupied by the said James Connell, and being city number, etc., were conveyed into and assigned to Malone to hold to the use of James Connell until the marriage, and thereafter to the use of the plaintiff, her heirs, executors, administrators and assigns.

The marriage took place on the 27th of March. Within five days from the execution of the assignment it was only registered in the proper office as a bill of sale. The affidavit of bona fides was made by the plaintiff after the marriage, being described therein as the bargainee.

The goods were afterwards seized by an execution creditor of the husband; the plaintiff claimed them, and an interpleader issue was directed by the High Court to be tried in the County Court.

At the trial it was objected that the trustee should have been the claimant and plaintiff in the issue, and on this ground judgment was given for the defendant.

Held, [reversing the judgment of the Court below] that the plaintiff's beneficial interest in and possession of the property was sufficient to enable her to maintain her claim in the issue. *Schræder* v. *Harnett*, 28 L.T.N.S., 702, followed.

(2) That the settlement was a sale of personal property within the meaning of the Act, and that the plaintiff was a person who, as a bargainee, might properly make the affidavit of bona fides.

(3) That the goods were sufficiently described and identified.

Semble, per HAGARTY, C.J.O., and OSLER, J.A., that a marriage contract or settlement, in the form of the instrument in question, was not a sale of personal property within the Act, and that registration therefore was not necessary.

Per PATTERSON, J.A., (1) That the transaction was within the statute, and (2) that the legal title to the goods was in the plaintiff.

Whiting v. *Hovey*, 12 A.R., 119; *Dominion Bank* v. *Davidson*, 12 A.R., 90, referred to.

[Dec. 22, 1888.

ARCHBOLD *v.* THE BUILDING & LOAN ASSOCIATION.

Mortgagor and Mortgagee — Redemption—Six months' notice or six months' interest after default.

This was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 15 O.R. 357, and came on to be heard before this Court (BURTON and OSLER, JJ.A., ROSE and MCMAHON, JJ.) on the 21st September, 1888.

The Court allowed the appeal with costs, holding that upon the evidence the parties, after the maturity of the mortgage, continued to deal upon the terms therein contained as far as applicable, and therefore that the option to pay off at any time the moneys

secured by the mortgage still operated after maturity in favor of the plaintiff.

S. H. Blake, Q.C., and *Foy*, Q.C., for the appellant.

Alan Cassells, for the respondents.

[Dec. 22, 1888.

DUNCAN *v.* ROGERS.

Way—Easement appurtenant to land conveyed—Agreement, construction of by Court.

This was an appeal by the plaintiff from the judgment of the Common Pleas Division, reported 15 O.R. 699, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, JJ.A.) on the 21st November, 1888.

The Court allowed the appeal with costs, being unanimously of opinion that upon the evidence it was clear a defined right of way existed at the time of the grant to the plaintiff, and that under the terms of the grant it passed to him. The Court were also of opinion that the finding of the jury as to the location of the extension of the lane should not have been disturbed, the written agreement in regard to this extension being ambiguous, and both parties having given evidence as to its real meaning and allowed the question to be submitted to the jury.

Fullerton and *W. Nesbitt*, for the appellant.

Tilt, Q.C., for the respondent.

[Dec. 22, 1888.

ADAMS *v.* THE WATSON MANUFACTURING CO. (Limited.)

Amendment—Adding parties—O.J.A.M.R. 103 *—Costs.*

This was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 15 O.R. 218, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, JJ.A.) on the 23rd November, 1888.

The Court dismissed the appeal with costs, being unanimously of opinion that under the circumstances set out in the report of the case in the Court below, the terms as to payment of costs imposed as a condition precedent to being allowed to amend, were proper.

G. T. Blackstock, for the appellant.

John Crerar, for the respondents.

[Dec. 22, 1888.

GREEN *v.* THE CORPORATION OF THE TOWNSHIP OF ORFORD.

Municipal corporation—Drainage—Work done in excess of contract—Necessary work—Liability of corporation.

This was an appeal by the defendants from the judgment of the Common Pleas Division, reported 15 O.R. 506, and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN JJ.A.,) on the 30th November, 1888.

The Court allowed the appeal with costs, being of opinion that the work in question was work that the plaintiff was bound to perform under the contract itself.

Quære, whether the work in question was in any event "necessary" in such a sense as to impose liability for payment therefor upon a municipal corporation without express contract. The correctness of the decision of the Court below upon this point doubted.

W. R. Meredith, Q.C., and *Douglas*, Q.C., for the appellants.

Moss, Q.C., and *Shoebotham*, for the respondent.

[Dec. 22, 1888.

Re THE OAKWOOD HIGH SCHOOL AND THE CORPORATION OF THE TOWNSHIP OF MARIPOSA.

High Schools—Application for municipal grant —R.S.O. c. 226, ss. 25, 35.

Held, that the words "maintenance, accommodation and other necessary expenses," in sub-sec. 6 of sec. 25 R.S.O., c. 226, include the purposes mentioned in sec. 35 (1), and consequently that an application under sec. 35 (1) must be made before the first day of August.

Held, also, that an application under sec. 35 (1.) must be the corporate act of the School Board, not merely the verbal request (however unanimous) of the individuals composing it, and must specify the purposes for which the money is required.

Held, also [MACLENNAN, J.A., dissenting], that to come within the provisions of sec. 35 an application must be an independent application for purposes mentioned in that section, and that an application combining other pur-

poses with these purposes may be rejected by a simple majority vote.

Held, also, that an application under sec. 35 may be rejected by the council, although no formal by-law relating to the purposes of the application is before the council, and the meeting at which the rejection takes place has not been called for the special purpose of considering such a by-law.

Per MACLENNAN, J.A. *Quære*, whether a township comes within the Act.

Decision of BOYD, C., reversed.

Moss, Q.C., and *D. J. McIntyre*, for the appellants.

Hudspeth, Q.C., and *Watson*, for the respondents.

[Dec. 22, 1888.

Re CLARK AND THE CORPORATION OF THE TOWNSHIP OF HOWARD.

Municipal corporations — Drainage Acts—By-law for repair of old drain—Assessing land benefited.

On the 21st September, 1868, a by-law was passed by the Township Council under the provisions of the Municipal Act of 1866 (29 & 30 Vic., c. 51, ss. 261, 282) for the construction of (among other drains) the M. drain, and the drain was thereupon constructed. On the 11th December, 1883, the Township Council passed a by-law for repairing and cleaning this drain, and directed that the amount required for this purpose should be assessed and levied on the lands assessed for the original construction of the drain. On the 21st September, 1886, another by-law was passed to change, in accordance with the report of an engineer, the assessment made for the original construction of the M. drain, so as to enable the assessment for repairing and cleaning the drain to be made more equitably, and the assessment for repairing the drain was adopted. This assessment for repairing and cleaning the drain was limited to the lands assessed for the original construction of the drain, although the engineer in his report pointed out that large tracts of land not assessed for the original construction of the drain were now benefited by it.

Held, that the provisions of the Act of 1869 (32 Vict., c. 45, s. 17), as to maintenance and repair (now R.S.O., c, 184, s. 583 (1), are not retroactive, and do not apply to drains constructed before the date of that enactment, and that therefore the Township Council had no power to pass the by-law in question.

Decision of ROBERTSON, J., affirmed on other grounds.

Pegley and *Mills*, for the appellants.

Wilson, for the respondents.

[Dec. 22, 1888.

THE CORPORATION OF THE TOWNSHIP OF NOTTAWASAGA *v.* THE HAMILTON AND NORTH-WESTERN RAILWAY COMPANY.

Railways—Agreement to erect and establish stations—Admissibility of oral representations to vary written agreement—Res adjudicata.

By agreement bearing date the 19th day of May, 1873, the defendants, in consideration of a bonus of $300,000 granted to them by a section of the county of Simcoe, of which the township of Nottawasaga forms a part, covenanted with the plaintiffs to (among other things) "erect, build and complete good and sufficient and suitable station buildings for passengers and freight," at five certain places within the township; to "establish at each of the places hereinbefore mentioned regular way stations;" and to "well and sufficiently keep and maintain the said five stations above mentioned with all such suitable, necessary and proper buildings as the business done, or capable of being done, at the said stations respectively may require for seven years after the trains shall have commenced to run on the said road, and (to) undertake to do the passenger and freight business of the county at said stations."

By a further agreement, bearing date the 25th day of May, 1878, the defendants, in consideration of a bonus of $20,000 granted to them by the plaintiffs, covenanted with the plaintiffs to "erect, build and complete good and sufficient and suitable station buildings for passengers and freight on the line of the said railway at the several places following in the said township"—five places being specified—and to "establish at each of such places regular way stations." This agreement provided that the route of the line of the railway through the township, as defined in the former agreement, might be deviated from to such an extent as to admit of the stations

being located at the points mentioned in the second agreement, and provided further that it should not be incumbent on the defendants to erect stations at the places mentioned in the former agreement, "but that the places herein defined for stations shall be taken to be in substitution for the places mentioned in such former agreement."

The defendants erected stations at the points specified, three of these stations being respectively called A. G. and N. Trains commenced to run on the line in the year 1878.

In 1880, the plaintiffs being dissatisfied with the mode in which the stations at G. and N. were being maintained, brought an action against the defendants for specific performance of the agreements. In this action a consent decree was pronounced and an injunction granted, restraining the defendants from ceasing to maintain the stations except in a certain manner in the decree specified. The decree contained no limitation or other provision as to the time during which the stations were to be maintained, though this question had been raised at the hearing of the action.

In 1885, after the expiration of the seven years, the defendants make changes in their mode of maintaining the station at A. The plaintiffs were dissatisfied, and this action was thereupon brought by them to compel specific performance.

Held, reversing the judgment of ROBERTSON, J., that the word "establish" does not in itself mean "maintain and use for ever"; that the seven years limitation applied to the substituted stations, and that the defendants were not bound to maintain them after the expiration of that time.

Bickford v. *The Town of Chatham*, 14 A.R. 32, and in the Supreme Court (not reported), *Jessup* v. *Grand Trunk Railway*, 7 A.R. 128, and *Geauyeau* v. *The Great Western Railway*, 3 A.R. 412, considered. *Wallace* v. *Great Western Railway*, 3 A.R. 44, distinguished.

Held, also, that the decree in the former action did not constitute the question of the seven years' limitation *res adjudicata*, there being no adjudication on that question, and in any event an adjudication on that question being unnecessary at the date of the former action. *Concha* v. *Concha* 11 App. Cas. 541 considered and followed.

At the trial evidence was admitted on behalf of the plaintiffs of representations made by directors of the defendant company, at meetings held to consider the question of granting the second bonus, to the effect that by the second agreement the defendants would be bound to maintain the stations for all time.

Held, that this evidence was clearly inadmissible.

W. Cassels, Q.C., and *R. S. Cassels*, for the appellants.

McCarthy Q.C., and *Pepler*, for the respondents.

[Dec. 22, 1888.

JONES *v.* THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Negligence—Carelessness contributing to accident—Railways—Approach to station.

To reach, from the highway, the station of the defendants at Point Edward, it is necessary to go through the railway yard and cross eleven railway tracks, and a planked way runs across these tracks, extending from the street to the east end of the station platform. The planked way is unfenced and unguarded. J., the husband of the plaintiff, who was familiar with the locality, while hurrying to the station before daylight, left this planked way upon reaching the track nearest the platform, in order to walk around the rear of a train that was coming in from the east on that track and was still in motion. While some twenty feet from the planked way, walking between the tracks and near the rails of the track second from the platform, J. was struck by the buffer beam of a shunting engine and killed. This shunting engine had been standing some 150 feet to the west of the planked way and was passing slowly to the east for the purpose of being switched on to the track nearest the platform, and then aiding in placing in the ferry boat the cars of the train that had just come in. The shunting engine had been standing to the west of the planked way for the purpose of convenience in giving orders to the engineer; its head-light was burning and as it moved its bell was ringing. There was ample space between the two tracks for a person to stand in safety, and the approach of the shunting engine could easily be noticed.

Held. [HAGARTY, C.J.O., dissenting], revering the decision of the Chancery Division, that the accident was due to the carelessness of the deceased and not to the negligence of the defendants, and that the plaintiff could not recover.

The extent of the duty of railway companies in providing safe access to their stations considered.

McCarthy, Q.C., and *W. Nesbitt*, for the appellants.

W. R. Meredith, Q.C., and *R. M. Meredith*, for the respondents.

PRATT *v.* THE MUNICIPAL CORPORATION OF THE CITY OF STRATFORD.

Municipal Corporation—Jurisdiction over streets—Changing level of street—Damage to adjacent owners—Absence of by-law—Remedy by action or arbitration.

Held, [BURTON, J.A., dissenting], affirming the decision of BOYD, C., that a municipal corporation can exercise and perform their statutable powers and duties in repairing highways or bridges, or erecting a new bridge instead of an old and unsafe one without passing a by-law therefor, and that the plaintiff, whose premises were "injuriously affected" by the level of the street on which they fronted being raised in order to construct a proper approach to a bridge that the defendants were lawfully re-building, could not maintain an action against the defendants, but must, in the absence of any negligent construction, proceed under the arbitration clauses of the Municipal Act R.S.O. c. 184, notwithstanding the absence of any by-law for the prosecution of the work.

Per BURTON, J.A. There was no obligation cast upon the defendants to re-build the bridge at such a height as to necessitate a change in the level of the street, and therefore the defendants could not lawfully change the level of the street without passing a proper by-law or that purpose.

Yeomans v. *The County of Wellington*, 4 A.R. 301, followed. *McGarvey* v. *The Town of Strathroy*, 10 A.R. 636, and *Adams* v. *The City of Toronto* 12 O.R. 243, discussed. *Van Egmond* v. *The Town of Seaforth*, 6 O.R. 610, distinguished.

W. Casse's, Q.C., for the appellant.

Idington, Q.C., for the respondents.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

MACMAHON, J.] [Dec. 31, 1888.

REGINA *v.* WARREN.

Criminal law—Keeping house of ill-fame—Husband and wife—Joint conviction.

There may be a joint conviction against husband and wife for keeping a house of ill-fame; the keeping has nothing to do with the ownership of the house, but with the management of it.

Rex v. *Williams*, 10 Mod. 63, and *Rex* v. *Dixon*, ib. 335, followed.

Badgerow, for the Crown.

W. G. Murdoch, for the prisoner.

Div'l. Ct.] [Dec. 22, 1888.

MCDIARMID *v.* HUGHES.

Company—Power to hold lands—Statutes of mortmain—Constitutional law—Powers of Dominion Parliament—Statute of limitations—Defendant setting up—Estopped by assenting to conveyance.

A conveyance of lands to a corporation not empowered by statute to hold lands, is voidable only and not void, under the statutes of mortmain, and the lands can be forfeited by the Crown only.

Where, too, a corporation is empowered by statute to hold lands for a definite period, and holds beyond the period, only the Crown can take advantage of it, and it is not a defence to an action of ejectment that the lands were acquired by the plaintiff from the corporation after the period fixed by the statute.

Semble, the Dominion Parliament has power to enact that a license from the Crown shall not be necessary to enable corporations to hold lands within the Dominion; and Dominion Act enabling a Quebec Corporation to hold lands in Ontario would operate as a license.

By an arrangement made within ten years before this action of ejectment was begun, the

land in question was conveyed by the owners of the legal estate to D., through whom the plaintiff claimed. One of the terms of the conveyance and a part of the consideration was that D. should, and he did thereby, release a debt which he held against the defendant and others. The defendant did not execute the conveyance, but he was an assenting party to the whole transaction, and was aware that the conveyance was being executed, and that D. was releasing his liability.

Held, that he was estopped from setting up a prior adverse possession in himself as effectually as if he had been a conveying party.

Per ARMOUR, C.J. At all events, upon the evidence, the possession of the defendant at the date of the conveyance, if any, was a tenant at will to the owners of the legal estate; and there was also evidence of an entry by D. sufficient to prevent the setting up by the defendant of any possession prior thereto.

W. H. Walker, for the plaintiff.

Aylesworth and *Wyld*, for the defendant.

ROSE, J.] [Dec. 31, 1888.

CONMEE *v.* CANADIAN PACIFIC R.W. Co.

(FOUR ACTIONS.)

Arbitrator—Disqualification—Offer by party of solicitorship pending reference—Subsequent acceptance—Order of reference, construction of—Judicature Act, 1881, *s* 48—*C.L.P. Act, ss.* 189, 209—9 *&* 10 *Wm.* III *c.* 15—*Interim finding of facts—Time for moving against—Waiver of objections to.*

By an order made at *nisi prius* on the 4th November, 1886, upon the application of the defendants, and without the consent of the plaintiffs, the actions and all matters in question therein were referred to the award of the persons named, who were given all the powers therein of a Judge of the High Court of Justice sitting for the trial of an action. By clause 2 of the order the referees were directed to make and publish their award in writing, on or before the 3rd January, 1887, or such other day as they should appoint. By clause 6 it was provided that there should be the right of appeal in the same way as if the order was made under s. 189 of the C.L.P. Act; and by clause 8, that the reference should be considered as made in pursuance of s. 48 of the Judicature Act, 1881, and also, in so far as the same is applicable, as under the provisions of s. 189 of the C.L.P. Act.

Held, that the reference was a compulsory one, so far as the plaintiffs were concerned, and that it was not a reference under 9 & 10 Wm. III, c. 15, but under s. 48 of the Judicature Act and s. 189 of the C.L.P. Act.

During the reference it was agreed between the parties that the arbitrators should proceed to the ground and ascertain by their own examination the quantities of material moved (as to which the dispute was), and certify their findings, and all other questions in the actions and reference were to remain open; and pursuant to this agreement the arbitrators proceeded to the ground, and ascertained certain facts, and on 23rd August, 1887, reported: "We do hereby find and certify that the plaintiffs moved the respective quantities hereinafter mentioned," etc.

Held, that this finding and certificate was not the award which clause 2 of the order of reference directed the referees to publish; nor was it an award within the meaning of s. 209 of the C.L.P. Act; but was merely a finding of facts pending the reference, to enable the arbitrators to make their award; and apart from the question of waiver, the parties were not bound to make any motion as to the finding until the making of the award; and therefore the objection that a motion against the finding made on the 29th May, 1888, was too late, failed.

Held, also, upon the evidence, that there was no waiver of the objections to the finding; and that, although the finding was not an award, the motion made against it by the plaintiffs was a convenient and proper one.

The finding and certificate was set aside, because, pending the reference and before the finding, one of the arbitrators had received an offer of the solicitorship of the defendant's Company, and had after the finding accepted it, and was thus disqualified from acting.

McCarthy, Q.C., and *Wallace Nesbitt*, for the plaintiffs.

Robinson, Q.C., and *S. H. Blake*, Q.C., for the defendants.

STREET, J.] [Dec. 31, 1888.

REGINA *ex rel.* JOHNS *v.* STEWART.

Municipal elections—Corrupt practices—Bribery by agents—Presumption as to candidate's intention—Gifts by candidate—Payments to canvassers.

A candidate for a municipal office, though not required by law to make his payments through a special agent, is not absolved from keeping a vigilant watch upon his expenditure; and a candidate who, on the eve of a hotly contested election, places a considerable sum of money in the hands of an agent capable of keeping part of it for himself and of spending the rest improperly or corruptly, who never asks for an account of it, gives no directions as to it, and exercises no control over it, must be held personally responsible if it is improperly expended. And where money given to agents by the candidate was, in fact, used in bribery,

Held, that the presumption that the candidate intended the money to be used as it was used became conclusive in the absence of denial on his part.

Gifts by a candidate to one who is at the time exerting his influence in the candidate's behalf are naturally and properly open to suspicion; and in the absence of any explanation such gifts must be regarded as having been made for the purpose of securing, or making more secure, the friendship and influence of the donee.

In the election in question every member of certain committees was paid a uniform sum of $2, nominally for his services as a canvasser, but apparently without regard to the time he devoted to the work, and without inquiry as to whether he had in fact canvassed at all.

Held, that these payments were corruptly made and constituted the offence of bribery as defined by ss. 2 of s. 209 of the Municipal Act.

Under the circumstances above referred to, and other circumstances of the case, the defendant was found personally guilty of acts of bribery, and to have forfeited his seat as mayor of the city of Ottawa.

Aylesworth, for the relater.

Chrysler, for the defendant.

Chancery Division.

Div'l Ct.] [Dec. 14, 1888.

WEBBER *v.* MCLEOD.

Malicious arrest—Unlawful and malicious injury—Findings of jury—Reasonable and probable cause—R.S.C., c. 168, *s.* 59.

Plaintiff was in occupation of a house on a farm of the defendant's, and cut off the ends of some logs used in the construction of a small building, which logs were so old and rotten that they had fallen out of their places in the building and the ends rested on the ground. Defendant had plaintiff arrested and imprisoned on a charge of "unlawful and malicious injury to his property," but the magistrate dismissed the case.

In an action for malicious prosecution the jury found, in answer to questions submitted by the Judge, that defendant did not have reasonable ground for believing that plaintiff had unlawfully and maliciously injured the property, and did not take care to inform himself as to the facts, and was actuated by other motives than the vindication of the law in laying the information, and assessed the damages at $100.

On motion to set aside the verdict the application was dismissed.

Per BOYD, C. It was open to the jury to find that the wood was of no value, and that the injury was of too trifling a character to justify the defendant in setting the criminal law in motion, and that was evidently the meaning of their answers to the questions. If there was no actual positive damage proved the plaintiff was not chargeable under R.S.C., c. 168, s. 59.

Held, also, that it was proper to leave the whole case to the jury, and the questions were sufficient for that purpose, and the jury having found a want of reasonable care on the part of defendant to inform himself of the true state of the case, that was a sufficient justification for holding that there was want of reasonable and probable cause.

Per FERGUSON, J. The jury virtually found that the property said to be injured was of no appreciable value, and, that being the case,

such facts and circumstances did not exist as are necessary to constitute reasonable and probable cause for the prosecution.

Moss, Q.C., for the motion.

W. Nesbitt, contra.

Full Court] Dec. 14, 1888.

HUTCHISON *v.* CANADA PACIFIC RAILWAY.

Railways — Negligence — Contributing Negligence—Travelling by freight Train.

The plaintiff was going from Ingersoll to Montreal by train in charge of cattle. At Toronto the train on which he had come from Ingersoll was partly broken up, to be re-made with some cars which were standing on another track at Toronto. While at the station at Toronto, plaintiff went into the caboose at the end of the cars which were to be added to the portion of the train which had come from Ingersoll, and though the plaintiff knew there would be a shock when the connection was made between these two parts of the intended train, he stood up in the caboose, and was washing his hands when the connection was made, and the resulting shock caused the injury. The evidence did not show that the defendants knew he was in the caboose at all, nor did the plaintiff prove negligence in any other way than as above.

Held, affirming the decision of Rose, J., that the mere fact of the accident happening to him was not in itself sufficient evidence of negligence, and the action must be dismissed.

Held, also, that there was evidence of contributory negligence in that the plaintiff knew he was in a freight train, where there would not be so much care shown, and yet stood up, instead of setting down as he might have done, while the connection was being made.

W. Nesbitt, for plaintiff.

Aylesworth, for the defendants.

Full Court.] [Dec. 22, 1888.

YOUNG *v.* SPIERS.

Assignment for creditors—Filing of claim—Right to rank—Collateral securities.

Wardlaw made an assignment to trustees for the benefit of his creditors prior to 1884. In July, 1884, Harvey filed a claim against the estate, claiming (1) upon two mortgages on land; (2) upon an open account and certain notes made by Wardlaw; (3) upon certain notes made by Turnbull in favor of Wardlaw, and endorsed over by Wardlaw to him, which were made by Turnbull for Wardlaw's accommodation, and were delivered to Harvey as a general collateral security for Wardlaw's indebtedness to Harvey. Since filing the claim the mortgage debts had been paid to Harvey, who had thereupon assigned the mortgages, and the Turnbull notes had been paid by Turnbull to Harvey, and Turnbull had thereupon filed a claim in respect to them against Wardlaw's estate. The mortgages had been given to secure payment of entirely separate and isolated debts from Wardlaw to Harvey. Harvey afterwards made an assignment to trustees for his creditors, and these latter now brought this action, claiming that notwithstanding all the above circumstances they were still entitled to rank on and receive a dividend from the Wardlaw estate on the whole of the above indebtedness, and on Harvey's claim as originally filed.

Held, that as to the mortgage debts they were not entitled to receive a dividend, these being separate and distinct debts, but that as to the Turnbull notes they were still entitled to rank, on the authority of *Eastman* v. *Bank of Montreal*, 10 O.R. 79, provided that they did not in all receive more than 100 cents on the dollar; and this did not prevent Turnbull also ranking in respect to the sum he had paid as accommodation maker.

Crerar, for the plaintiffs.

Creelman, for the defendants.

BOYD, C.] [Jan. 9, 1889.

THE CORPORATION OF THE VILLAGE OF EAST TORONTO, *et al.*, *v.* THE CORPORATION OF THE TOWNSHIP OF YORK.

Erection of new municipality—Division of assets —School fund.

On the erection of two village municipalities out of a township,

Held, that the moneys derived from "The Ontario Municipalities Fund," which had some years before been by by-law appropriated to the school purposes of the township,

were assets properly divisible between the township and the new village municipalities.

Re Albemarle, etc., 45 U.C.R., 133, referred to and distinguished.

E. D. Armour, for the plaintiffs.

J. K. Kerr, Q.C., for the defendants.

Practice.

ROBERTSON, J.] [Jan. 9, 1889.

MOSES *v.* MOSES.

Costs—Scale of—Jurisdiction of Division Court—Ascertainment of amount.

The defendant signed a writing in these words: "Brantford, Oct. 9th, 1886. If anything happens to me sudden, this is to insure my son Joseph (the plaintiff) to take $100 from his sister Hannah's share, to repay money lent to her. If I live until this time next year I will settle it with him."

Held, that this was not a sufficient ascertainment of the amount due, by the signature of the defendant, within the meaning of R.S.O., c. 51, s. 70, to allow of a claim upon it and other items (amount to about $60), being joined in a Division Court action.

McDermid v. *McDermid*, 15 A.R. 287, followed.

Re Graham v. *Tomlinson*, 12 P.R. 367, referred to.

Aylesworth, for plaintiff.

Fullerton, for defendant.

ROBERTSON, J.] [Jan. 9, 1889.

ODELL *v.* BENNETT.

Counter-claim—Slander—Mortgage action—Inconvenience—Delay—Rule 374.

A counter claim for damages by reason of false and depreciatory statements with regard to the value of the mortgaged premises having been set up by the defendants in an ordinary mortgage action, an order striking it out under Rule 374 was affirmed, as well on the ground of inconvenience in trying the action and counter claim together, as on the ground that the counter claim was filed for delay.

McLean v. *Hamilton Street Railway Co.*, 11. P.R. 193, and *Central Bank* v. *Osborne*, 12 P.R. 160, followed.

E. T. English, for the plaintiff.

Hoyles, for the defendants.

BOYD, C.] [Jan. 10, 1889.

NIAGARA FALLS PARK COMMISSIONERS *v.* HOWARD.

Discovery—Particulars—Title—Form of order—Disclosing evidence relied on.

The practice in ordering particulars depends in this Province on the inherent jurisdiction of the Court to prevent injustice being done, the rules in force in England not having been adopted here.

In an action of trespass to land, the defendants pleaded a lease from the Dominion Government, and that the lands had been vested in the Government as ordnance lands. This was pleaded in an unexceptionable manner, and no affidavit was filed by the plaintiffs to show that they were unable to reply without further disclosure; yet an order was made by the Master in Chambers for particulars of the facts and means by which, and the time at which, the lands became ordnance lands. It did not appear that the defendants had any special means of information as to the matter of title, not open to the plaintiffs.

Held, that the order was wrong in form; the utmost should have been to declare that the defendants should not be allowed to give evidence in support of this part of their defence, except in so far as they furnished particulars.

But even such an order as indicated should not have been made in this case; for a party is not obliged to disclose upon what evidence he relies, or by what means he is going to prove his contention.

Irving, Q.C., for the plaintiffs.

H. Symons, for the defendants.

STREET, J.] [Jan. 11, 1889.

RE PRITTIE TRUSTS.

Trustees—Remuneration—Exchange of securities—Collection of rents.

Trustees under a marriage settlement exchanged an investment of the estate in Manitoba lands into the stock of a land company. Nothing by way of income had ever been realized from either land or stock, and it was stated that both were valueless. The responsibility of making the exchange was taken away by the consent of the persons interested.

Held, that a percentage upon the nominal value of the stock was not the way to arrive

at the trustees' remuneration, but that they should be allowed a sum to cover their trouble in making the exchange; and the allowance made by a referee was reduced from $162.50 to $50.

Certain rents were collected by the trustees through an agent, whom they paid by commission.

Held, that they were justified in employing an agent to make the actual collections for them, but were bound to look after the agent, and for their own care, trouble and responsibility were entitled to an allowance of two and a half per cent. upon the rents collected.

Moss, Q.C., for the trustees.

W. H. C. Kerr, for the *cestui que trust*.

BOYD, C.] [Jan. 14, 1889

In re ANDERSON AND BARBER.

Interpleader—Intercepting rent—Action for rent in County Court—Application by tenant to High Court for interpleader order—Entitling of affidavits—Garnishment by Division Court creditors—Charging order—Rules 1141 *et seq.*, 1162 *et seq.—Costs.*

Rent being due by A. to B., A. was served as garnishee with Division Court summonses by E. and G., each claiming part of the rent. A. refusing to pay his rent unless he was protected from these claims, he was sued by B. for the full amount of the rent in a County Court. Before this action was begun G. presented to A. an order upon him signed by B. for part of the rent due.

A. applied to a Judge of the High Court of Justice in Chambers for an interpleader order. The affidavits on which he moved were entitled "In the H.C.J., Chy. Div., between A,. applicant, and B. and others, claimants."

Held, that A. was entitled to be relieved by calling on the rival parties to interplead, under the procedure indicated by Rules 1141 *et seq.*; and an objection to the manner of entitling the affidavits was overruled. There was no jurisdiction in the County Court to give relief by way of interpleader in the action brought by B.; the jurisdiction in that Court being limited by Con. Rules 1162 *et seq.* to proceedings against absconding debtors, and after judgment when execution has issued. G's. claim might have been litigated in the County Court, and would not have been the subject of interpleader proceedings; but the order made being for a stay of the County Court action and payment into Court by A. of the rent, G's claim should be the subject of inquiry in the High Court.

Held, also, that A's. costs of the application should be borne by E. and G., who submitted to have their claims barred, and also had been the cause of the expense and delay, and that there should be no costs to either party of the County Court action.

Justin, for the applicant.

W. R. Meredith, Q.C., *Hoyles*, *F. R. Powell*, and *Robinette*, for the respective claimants.

STREET, J.] [Jan. 11, 1889

HYNE *v.* BROWN.

Infant—Defendant in action of tort—Appointment of guardian—Rule 261.

In an action of seduction brought against an infant, the defendant was served personally and entered an appearance in person.

Held, that the common law practice referred to in Rule 261 meant the practice of by which a real guardian and not a fictitious one was appointed; and an order was made requiring the defendant to appear by guardian within six days, and in default for the plaintiff to be at liberty to appoint a guardian for him, the consent of such guardian being shown and that he had no interest adverse to the defendant.

Kappele, for plaintiff.

STREET, J.] [Jan. 23, 1889.

JOHNSON *v.* KENYON.

Costs—Scale of—Action for damages for failure to return promissory note—Recovery of $314*—Ascertainment of amount—Jurisdiction of County Court—Offer of costs, effect of.*

The plaintiff held the defendant's note for $300, and gave it back to the defendant to hold until he should be free from a certain liability as surety. After he became freed he refused to give up the note, and destroyed it, and this action was brought for damages for breach of his contract to return the note. The action was referred to a referee, who found the plaintiff entitled to $314 damages, being the amount of the note and interest.

Held, that as soon as the facts relating to the note had been arrived at, the quantum of damages was a fixed amount, ascertained by calculating the amount of the defendant's

liability upon the note; and therefore the claim was within the jurisdiction of the County Court, under R.S.O. c. 47, s. 19, ss. 2; and the plaintiff was entitled to costs upon the County Court scale only. The defendant was entitled to set off the difference between County Court and High Court costs of his defence.

Before a motion for costs was made, the defendant offered to pay the plaintiff's costs upon the County Court scale.

Held, that this was not an offer which the plaintiff was bound to accept, and the plaintiff was entitled to the costs of the motion in the County Court scale.

J. B. Clarke, for the plaintiff.

Aylesworth, for the defendant.

Miscellaneous.

SPRING SITTINGS, CHANCERY DIVISION, 1889.

THE HON. MR. JUSTICE ROBERTSON.

Toronto.....Monday.....8th April.

THE HON. THE CHANCELLOR.

Chatham.....Wednesday....6th March.
Sandwich .....Tuesday.....12th March.
London.....Monday.....18th March.
Walkerton.....Thursday.....11th April.
Goderich ... .Wednesday.....17th April.
Sarnia.....Thursday.....25th April.
St. Thomas.....Wednesday.....1st May.

THE HON. MR. JUSTICE PROUDFOOT.

Brantford.....Wednesday....6th March.
Simcoe.....Wednesday.....13th March.
Owen Sound.....Monday.....1st April.
Hamilton.....Monday .....20th May.
Guelph.....Thursday.....30th May.
St. Catharines....Thursday.....6th June.

THE HON. MR. JUSTICE FERGUSON.

Belleville.....Thursday.....21st March.
Cornwall.....Monday.....15th April.
Ottawa.....Monday.....22nd April.
Kingston.....Wednesday.....22nd May.
Brockville.....Tuesday.....28th May.
Cobourg.....Thursday.....6th June.

THE HON. MR. JUSTICE ROBERTSON.

Lindsay.....Monday.....11th March.
Peterborough.....Friday .....15th March.
Woodstock.....Wednesday....20th March.
Stratford.....Wednesday.....3rd April.
Whitby.....Tuesday.....7th May.
Barrie.....Monday.....13th May.

SPRING CIRCUITS, 1889.

THE HON. CHIEF JUSTICE ARMOUR.

Stratford.....Tuesday.....12th March.
Guelph.....Tuesday.....19th March.
Berlin.....Tuesday.....26th March.
Brantford.....Wednesday.....3rd April.
Simcoe.....Monday.....8th April.
Cayuga.....Thursday.....11th April.
Welland.....Monday.....15th April.
Hamilton.....Tuesday.....23rd April.

THE HON. MR. JUSTICE ROSE.

Milton.....Monday.....11th March.
Brampton.....Thursday.....14th March.
Orangeville.....Monday.....29th April.
St. Catharines....Monday.....6th May.

THE HON. MR. JUSTICE FALCONBRIDGE.

Cornwall.....Tuesday.....12th March.
Whitby.....Monday.....18th March.
Napanee.....Monday.....25th March.
Kingston .....Monday.....1st April.
Brockville.....Tuesday.....9th April.
Picton.....Tuesday.....16th April.
Belleville.....Monday.....22nd April.
Cobourg.....Monday.....6th May.

THE HON. MR. JUSTICE STREET.

Walkerton.....Tuesday.....12th March.
Goderich .....Tuesday.....19th March.
Sarnia.....Tuesday.....26th March.
St. Thomas.....Monday.....1st April.
Chatham.....Monday.....8th April.
Sandwich.....Wednesday.....17th April.
Woodstock.....Wednesday.....24th April.
London.....Monday.....6th May.

THE HON. MR. JUSTICE MACMAHON.

Ottawa.....Tuesday.....12th March.
L'Orignal.....Monday.....25th March.
Perth.....Thursday.....28th March.
Pembroke.....Tuesday.....2nd April.
Barrie.....Monday.....8th April.
Peterborough.....Monday.....22nd April.
Lindsay.....Monday.....29th April.
Owen Sound.....Monday.....6th May.

THE HON. MR. JUSTICE ROSE.

Toronto.

Civil Court.....Monday.....18th March.
Criminal Court...Monday.....15th April.

IN our last number at page 64, in *Colton v. Schell*, "ignoring" should be "issuing," and in *Furness v. Gilchrist*, on the same page, "covered by" should be "bound by"

The Canada Law Journal.

VOL. XXV. MARCH 1, 1889. NO. 4.

THE legal proceedings for the winding up of the Central Bank have been unusually expeditious, and so far beneficial to the creditors. The heavy burden of the litigation has been borne by the Master-in-Ordinary, though it was not part of his ordinary duties, or compulsory on him to undertake it. The Dominion statute in effect makes him an additional judge of the High Court for winding up cases, by providing that the judicial powers conferred upon the Court by the Act "may be exercised by the Master-in-Ordinary," as well as other officers named in the Act.

BILLS AND NOTES.

IN the proceedings of the Dominion Parliament we notice with pleasure the introduction in the House of Commons, by Sir John Thompson, Minister of Justice, of Bill No. 5, "An Act relating to Bills of Exchange, Cheques and Promissory Notes"—a copy almost *verbatim et literatim* of the English Act 45 & 46 Vict., c. 61—intituled "An Act to codify the law relating to Bills of Exchange, Cheques and Promissory Notes" (1882)—an Act admitted by general consent to be admirably drawn, and the best specimen of the codification of the law on a most important subject which has been yet produced in the shape of an Act of Parliament. Sir John Thompson has wisely made no changes in the matter or wording of the English Act, in applying it to Canada, except such as are obviously necessary—as, for instance, the days to be observed as holidays, the substitution of the word "Canada" for "the United Kingdom," and the retention of the Canadian rule that when the last day of grace is a non-judicial day, the bill or note shall be payable on the next *following* judicial day—instead of the next *preceding* day, as in England—and in the mode of protesting a bill or note when the services of a notary cannot be obtained. There are also some forms, and a tariff of fees, which are not in the English Act. With these slight exceptions the Bill is identical, clause for clause, with the English Act. We suppose that although it is not the common practice to refer a Government Bill to a special committee, this Bill may perhaps be referred to the Sessional Committee on Banks or Banking, or to one specially selected for its consideration; and will, no doubt, be thoroughly examined and tested by gentlemen conversant with the subject. The object of the Bill is of course to make the law the *same in all* our provinces; and it is fortunate that in the Revised Statutes of Canada, vol. 2,

the laws in force on the subject in the several provinces, except only in Quebec under the civil code, are given in full; and in vol. 3 that portion of the law which is contained in the civil code is given in like manner; so that the committee examining the Bill will have all the statute law in force in Canada on the subject before them, and can make any correction in the Bill which may be seen to be required by the special circumstances of any province. There are appended to the Bill the tariff of fees before mentioned, and a number of forms, which are not appended to the English Act, and which have been taken chiefly from the statutes in force in Quebec, where it is believed they have been found useful. These of course will require consideration. It seems to us that Sir John Thompson has given our Parliament the opportunity and the material for a codification of a most important portion of the statute law of the Dominion, and that the people of Canada will be deeply indebted to him for so doing.

SOLICITOR AND CLIENT.

OF all the business relations of life, perhaps the most important is that which exists between solicitors and their clients. These relations are often of the most intimate character. To the solicitor is confided not only the management of his client's business, but family secrets and difficulties which are hidden from the rest of the world, are often of necessity confided to him. The intimate relations thus established naturally in some cases beget feelings of friendship and gratitude on the part of the client, and enable the solicitor to exercise a degree of influence over his client, which might often be exercised to the prejudice of the latter, did not the law very wisely guard the interests of the client, so as to practically invalidate all transactions between solicitor and client whereby the former gains any benefit beyond his legal fees. Lawyers are like other men, and are liable to form an extravagant estimate of the value of their services, and sometimes may think themselves deserving of, and justified in accepting from their clients, gifts over and above their legal fees for services rendered. The law has, however, imposed a very strict rule to guard both the client from making improvident gifts to his solicitor, and the solicitor from the temptation to use any influence he acquires over his client for his own benefit. All dealings between a client and his solicitor, whereby a benefit over and above his legal fees results to the solicitor, are regarded by the Courts with the greatest jealousy. In many cases the transaction will be altogether set aside, and in others absolute transfers of property will be treated as mere securities for the actual indebtedness from the client to the solicitor; and in all such cases the onus is upon the solicitor, in the event of litigation, to establish by the clearest evidence that the transaction is one which is perfectly fair and reasonable, and that it was entered into free from any influence on his part. This jurisdiction, as was remarked by Turner, V.C., in *Billage* v. *Southee*, 9 Ha. 540: "Is founded on the principle of correcting abuses

of confidence, and it is one of universal application ; and the cases in which the jurisdiction has been exercised—those of trustee and *cestui que trust*, guardian and ward, attorney and client, surgeon and patient—are merely instances of the application of the principle."

Gifts from clients to their solicitors, made while the relation of solicitor and client subsists between them, are, as a rule, absolutely void. The leading authority on this point is *Middleton* v. *Welles*, 4 Br. P.C. 245 ; 1 Cox 125. In this case the client was a poor man, of intemperate habits, and of eccentric character, who, by the unexpected death of his cousin intestate, became heir to his estate, which was of considerable amount. A firm of solicitors informed him of his succession to the estate, and accompanied him to obtain—and did obtain on his behalf—letters of administration to the estate. Shortly afterwards they procured him to execute a transfer of the estate to them, they agreeing to pay him an annuity of £52 during his life. The deed recited that the intestate had intended to benefit the solicitors by making a will in their favor, and that the client desired to effectuate this alleged intention of his deceased cousin, but of the truth of this recital no evidence was given. The deed was read over to the client, and explained by an independent solicitor, who was called in by the donees for the purpose, and this solicitor testified that the client seemed perfectly to understand the matter and acted voluntarily. The client died during the same year, and the action was brought by his representatives to set aside the transaction. The judgment of the House of Lords is very briefly reported ; but from the head-note it would appear that their Lordships adopted the argument of counsel for the plaintiffs, and laid down that it is an established rule in Courts of Equity that no gift or gratuity to any attorney beyond his fair professional demands, made during the time he continues to conduct or manage the affairs of the donor, shall be permitted to stand ; and more especially if such gift or gratuity arises immediately out of the subject then under the attorney's conduct or management, and if the donor is at the time ignorant of the nature and value of the property so given.

When the case was originally before Lord Thurlow, L.C., he said : " In the case of attorneys it is perfectly well known that an attorney cannot take a gift while the client is in his hands, nor instead of his bill ; and there would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hands, if it was not so."

In *Tomson* v. *Judge*, 3 Drew. 306, a deed of land made by a client to his solicitor, purporting to be made in consideration of £100, but which the solicitor admitted to have really been made as a gift, was set aside. Kindersley, V.C., thus lays down the law : " Now, as to the case of purchases by solicitors from their clients, there is no rule of the Court to the effect that the solicitor cannot make such a purchase. A solicitor can purchase his client's property even while the relation subsists ; but the rule of the Court is that such purchases are to be viewed with great jealousy, and the onus lies on the solicitor to show that the transaction was perfectly fair ; that the client knew what he was doing, and in particular

that a fair price was given, and of course that no kind of advantage was taken by the solicitor:" p. 313. Further on he proceeds to point out the rule as regards gifts, thus: "In the case of a gift the matter is totally different, and it appears to me that there is a far stricter rule established in this Court with regard to gifts than with regard to purchases, and that the rule of this Court makes such transactions, that is, of gifts from the client to the solicitor, absolutely invalid:" p. 314. And on p. 315 he says that in the opinion of Lords Thurlow, Erskine and Eldon, "it is not open to the attorney to show that the transaction was fair." In *Walmsley* v. *Booth*, 2 Atk. 25, Lord Hardwicke at first refused to set aside a bond obtained by an attorney from his client as a gratuity, on the ground that the client was a man not in the least likely to be imposed upon, but on appeal he reversed his own decree; and in *Kenney* v. *Brown*, 3 Ridg. P.C. 462, a gift to a solicitor by his client of a part of the estate, which was the subject of a suit carried on by the attorney, was set aside.

In *O'Brien* v. *Lewis*, 4 Giff. 221, a solicitor claimed a sum of £300 on the ground that he had been directed by his client to retain that sum as a gift, but it appearing that the direction had been given during the existence of the relationship of solicitor and client Stuart, V.C., held the gift to be invalid, and on appeal this decision was affirmed (32 L.J. Chy. 569,) Lord Westbury saying in the course of his judgment on the appeal:—"The law treats the relation between solicitor and client in a peculiar manner. It has laid down certain rules and scales of charges, by which the services of a solicitor are to be remunerated, and it imposes on him an obligation not to bargain with his client while the relation exists for any additional benefit beyond that legal remuneration." In this case the gift was made in 1852, and the suit to set it aside was not commenced until 1861, and it was held that the delay afforded no defence.

The recent case of *Tyass* v. *Alsop*, 59 L.T.N.S., 367, was somewhat similar in its facts. There a client out of gratitude to her solicitor in recovering a large sum of money, between £4,000 and £5,000, voluntarily directed the solicitor to retain £1,000 out of the fund, as a present, over and above his taxed costs; but Kekewich, J., had no difficulty in deciding that the gift could not be upheld, and the solicitor was ordered to pay over the £1,000 with interest to the plaintiff who was the personal representative of the donor, who had died three years after the gift, and who, previous to her death, and after the relationship had ceased, had expressed her willingness to abide by the gift. Kekewich, J., says: "In order to sustain such a gift you must have something done after the confidential relation has ceased, amounting to a release of the client's right to set aside the gift. Now there is nothing whatever in this case except the bill of costs delivered in 1882, and £95 paid as balance, and the girl's acceptance, without insisting upon a claim to the £1,000, and what passed on the 27th April. As regards the first event there is nothing of an active character in it. What happened on the 27th April is far more important. She came not, as I said, as a client, but as a person in distress, and she did refer to the gift of £1,000 as something she meant to abide by. But suppose she had changed her mind next day, could Messrs. Alsop,

Moore & Co. reply to that by saying, 'Why, on the 27th of April she told us that she was urged to bring this action, and make this claim, but did not intend to do so, and was determined to abide by what she had done and to adhere to her gift.' I cannot doubt that that defence could not have been supported if she had changed her mind. There was nothing equivalent to release, but only a declaration of intention which could not have been set up as a defence to an action." This case has since been affirmed by the Court of Appeal; see *Law Times Journal*, vol. 86, p. 279.

In *Wright* v. *Proud*, 13 Ves. 138, Lord Eldon says: "Independent of all fraud an attorney shall not take a gift from his client while the relation subsists; though the transaction may be not only free from fraud but the most moral in its nature." And again in *Wood* v. *Downes*, 18 Ves. 127, he says: "It is not denied in any case, that if the relation has completely ceased, if the influence can be rationally supposed also to cease, a client may be generous to his attorney, or counsel, as to any other person, but it must go so far." And in *Montesquieu* v. *Sandys*, 18 Ves. 315, he also says: "The connection must, as in the case of guardian and ward, be *bonâ fide* dissolved before he can take anything beyond his regular fees." Lord Brougham, L.C., in *Hunter* v. *Atkyns*, 3 My. & K. 136, states the rule somewhat differently, but practically to the same effect, thus: "Standing in the relation in which he stands to the other party, the proof lies upon him (when in the case of a stranger it would lie on those who opposed him) to show that he has placed himself in the position of a stranger, that he has cut off as it were the connection which bound him to the party giving or contracting, and that nothing has happened, which might not have happened, had no such connection subsisted." The law in these cases is also stated by Bacon, V.C., in *Minet* v. *Morgan*, 6 Chy. D. 638. The head note of that case seems a little paradoxical, it is as follows: "To prevent the operation of the rule that a solicitor shall not take a gift from his client, *while the relation subsists*, there must not only be a total absence of fraud, misrepresentation, or even suspicion, *but there must be a severance of the confidential relation.*" But Bacon's, V.C., own statement of the law is quite explicit, at p. 645, he says: "The law I take it to be as plainly settled on the subject as any law existing in this country, that while the relation of solicitor and client subsists, the solicitor cannot take any gift from his client. That is the rule of law, a rule which, if it were necessary for me to justify it, I should say was requisite for the safety of society." In that case, after the gift, the donor in the presence of another solicitor who fully explained the matter to him, executed a codicil to his will confirming the transaction. But as to this, Bacon, V.C., remarks: "Is that what the law requires? The law requires that the relation should be severed in the first place. It requires that in consequence of that severance some independent advice should be obtained by the donor," p. 648: and he set aside the gift notwithstanding the codicil. See also *Waters* v. *Thorn*, 22 Beav. 549.

It is somewhat singular, however, that in *Minet* v. *Morgan* the earlier decision of Lord St. Leonards, L.C., in *Stump* v. *Gaby*, 2 D.G. M. & G., 623, was not referred to either by counsel or the Court. There a conveyance by a client to his

solicitor was impeached, and the defendants pleaded that after the making of the deed the client had by his will, reciting that certain of his relatives had threatened to dispute the conveyance, thereby ratified and confirmed the conveyance, and for the further confirmation thereof did devise the land in question to the solicitor. The plea did not allege any facts showing how the will had been made, or that the testator had any independent advice in making the will, but on demurrer it was held good. On appeal, it was argued for the plaintiffs that the conveyance itself, being voidable by reason of the alleged fraud, was not susceptible of being confirmed by a simple instrument, such as the will set up, which, it was argued, was evidently obtained by the solicitor exerting the same undue influence; and, to use the language of the Court in an old case, was "a contrivance only to double hatch the cheat": *Wiseman* v. *Beake*, 2 Vern. 121. Under such circumstances it was contended a Court of Equity imposes an obligation on the party deriving a benefit from the instrument of confirmation, to show by the clearest evidence that the act of confirmation was done with all the deliberation that ought to attend a transaction, the effect of which is to ratify that which in justice ought never to have taken place. But Lord St. Leonards says, at p. 631: "It is beyond dispute that a man may, if he pleases, confirm a voidable conveyance; and if a client dealing with his solicitor executes a voidable instrument, and afterwards chooses to confirm it by will, he clearly may. The difference between the confirmation of such an instrument by a contract between the same parties, and a testamentary disposition, is that when a client deals with an attorney, and the latter commits what may be considered a fraud in this Court, and then induces the client to confirm that dealing, the attorney has to show that the confirmation was made by the client with a full knowledge of his rights to set aside the conveyance. I have nothing to do with such a case, nor do I wish to disturb the decisions on that head; but here there was no such dealing: the party was disposing of his own property by will in favor of a person with whom he had previously been dealing, and it was equally competent for him to have disposed of the same property in favor of any other individual. It was a testamentary act, it was not a matter of contract, and the will is therefore the guide under which the Court must act; the testator has devised the estate in express terms, and my opinion is that if he had not so devised it, but had simply said, referring to the prior conveyance, 'I confirm it,' that alone would have been a valid confirmation."

It will be seen from the passage cited that, in the opinion of Lord St. Leonards, a vital difference exists between a confirmation of a voidable deed or gift, by contract, and a confirmation by will. In the latter case he virtually held that it was unnecessary to show that the will was made by the testator when free from the influence and control of the solicitor to whom the voidable conveyance had been made; but, in view of the general tenor of the authorities, it is perhaps doubtful whether this position can be maintained to its full extent: See *Waters* v. *Thorn*, 22 Beav. 549.

The Court will not interfere with mere trifling benefits conferred by a

client on his solicitor upon the mere proof of the existence of the relationship, unless there be *mala fides: Rhodes* v. *Bates*, 2 Chy. 252. But according to the general current of the authorities to which we have already referred, it would seem that it is impossible to uphold, under any circumstances, a gift of any considerable amount from a client to his solicitor, made during the existence of the relationship; but *In re Holmes, Woodward* v. *Humpage*, 3 Giff. 345, Stuart, V.C., said: "The principle of influence vitiates the gift, but the presumption of influence may be rebutted by circumstances *short of the total dissolution of the relation of solicitor and client.* The relation is only looked at as creating the influence; and as soon as circumstances of evidence are introduced which remove all effect of the influence, whether the relation subsists or not, if the influence of that relation is removed, there is no incapacity on the part of the solicitor to become the subject of his client's bounty, and to be the recipient from his client of a gift wnich will be valid at law and in equity." Whether this statement of the law is correct or not, it is certain that very few, if any, cases are to be found in the reports in which, where the relationship has existed, evidence has been given so as to successfully rebut the presumption of influence which arises from the mere fact of the existence of the relationship.

Indeed, wherever a confidential relationship is established, the Court presumes its continuance, unless there is distinct evidence of its determination: *Rhodes* v. *Bate*, 2 Chy. 252. But it will appear as we proceed that even the severance of the relationship is not enough to validate a gift, unless it is also established that the influence resulting from the relationship theretofore existing has also ceased.

While the Court considers it "highly improper for a solicitor to derive a personal advantage in the shape of gifts from his clients, or in the shape of the liquidation of his bills untaxed and undelivered, still the Court cannot approve of clients entering into transactions with their solicitor, whereby they obtain from him present relief; and at the same time indulge the expectation that the Court will afterwards, at their instance, annul the whole transaction on the ground of the relation subsisting between them;" *per* Romilly, M.R., in *Gardener* v. *Ennor*, 35 Beav. 558, in which case, securities taken by the solicitor from the client were ordered to stand as security for what should appear to be actually due on a taxation, but costs were withheld from the client; and see *White* v. *Lightbourne*; 4 Br. P.C. 181; *Morgan* v. *Higgins*, 1 Giff. 270; *Newman* v. *Payne*, 2 Ves. 199 4 Br. C.C. 350.

The same principles which apply to gifts by clients to their solicitors, apply equally to gifts from clients to their counsel, and on this point the well-known case of *Broun* v. *Kennedy*, 33 Beav. 133, is a leading authority. That case arose out of the remarkable litigation which, some thirty years ago, attracted the attention of all England, in reference to the disputed will of Samuel Swinfen. This gentleman died in 1854, and by his will devised all his estates, worth £60,000, to his daughter-in-law, Patience Swinfen. The will was contested, and at the first trial, Sir Frederic Thesiger, who acted for the devisee, without the

concurrence of his client, consented to a compromise. This compromise Patience Swinfen refused to be bound by, and it was at this juncture Mr. Kennedy appeared on the scene as her counsel; and having defeated the attempts made to enforce the compromise, first by attachment of his client, and afterwards by suit for specific performance, he ultimately succeeded in compelling a new trial which resulted in a verdict in favor of his client by the establishment of the validity of the will under which she claimed. Mr. Kennedy had all along refused to receive any fees for his services, which extended over several years, but relied on the promise of his client, that his strenuous exertions on her behalf would be amply and substantially rewarded. She had, according to his account, promised him £20,000 in the event of success, and about two months after the litigation had been brought to a close, she, at his solicitation, made a deed of the estates to him, to hold during her life for her benefit and after her decease for himself in fee, subject to a charge for debts, not to exceed £10,000, and to her appointment of a further sum of £10,000 in favor of her relations. This deed was prepared by an independent solicitor, who read it over and explained it to the client, and she perfectly understood it. Two years afterwards, however, she married Broun, much to the dissatisfaction of Mr. Kennedy, and then a change came over her relations with him, which resulted in a suit being brought to set aside the deed. In this she was successful. Mr. Kennedy attempted to support it as a gift freely and voluntarily made, and also as the fulfilment of a contract to remunerate him for his services. Sir John Romilly, M.R., was of opinion that the deed could not stand, as it was clear that although it was prepared, and explained by, and executed in the presence of, an independent solicitor, the client was at the time completely under the control and influence of Mr. Kennedy, and in reply to the argument of the defendant, that at the time of the execution of the deed he was not her counsel, as she was not then engaged in litigation, he says at p. 148: "But this Court does not proceed *on the mere technicality of the existence of such a relation at that moment*, if the fact were so, but upon the proof of the degree of influence existing at the time, which in the present case is established conclusively, and also that it arose from the relation of confidential adviser and counsel previously existing, and subsequently continued, and which enabled the defendant to exert over the mind of the grantor a power sufficient to obtain the deed." So far as the attempt to support the deed on the footing of contract was concerned, the case was virtually concluded by the previous decision in *Kennedy* v. *Broun* 13 C.B.N.S., 677, in which Kennedy had brought an action to recover on the alleged promise to pay him £20,000 for his services, and it was held by the Court of Common Pleas that such a promise, even if established, constituted no obligation on which an action could be maintained by counsel against his client.

Not only may a solicitor not take any gift over and above his fees, but a security taken for costs to accrue in respect of future services to be rendered, is void: *Hope* v. *Caldwell*, 21 C.P. 241, *Robertson* v. *Caldwell*, 31 U.C.Q.B., 402, and any bargain by the client to pay more than the legal charges, cannot be enforced: *Re Geddes & Wilson* 2 Chy. Ch. 447.

It may be well to notice two or three of the very few instances in which gifts from a client to his solicitor have been upheld. *Oldham* v. *Hand*, 2 Ves. 259, was a case in which a large sum of money had been recovered by the solicitor for his clients, and the latter made the solicitor a present of £4,000. The case is not very fully reported, but it would seem that in the course of the suit, the parties in some way or other, which is not explained in the report, ratified the gift, which under the circumstances was upheld. But how they came to bring a suit to set aside the transaction, and then in that suit ratified the transaction they sought to impeach; and how it was that after the ratification the case came to be submitted to the judgment of the Court, is not apparent from anything that appears in the report itself. On the whole, therefore, this case appears to be *sui generis*, and cannot be considered as an authority establishing any general principle. In *Harris* v. *Tremenheere* 15 Ves. 34, the suit was brought by the representatives of a deceased client to set aside certain leases granted by him to his solicitor, who was also a distant relative. Some of the leases were purely voluntary gifts made by the client to the solicitor on the former receiving an accession of fortune. One had been purchased by the solicitor from the client, and another had been granted by the client under the following circumstances: The solicitor being about to be married, wrote to his client offering to purchase the leasehold as a provision for his intended wife; but the client refused to sell, and instead, insisted on making a gift of the lease. This last transaction and also the gifts of the other leases were upheld, but the lease purchased was set aside on the ground that there was not sufficient evidence that it was a proper bargain, and that a fair consideration had been paid.

(*to be continued.*)

COMMENTS ON CURRENT ENGLISH DECISIONS.

CONTRACT—BOND—CONSIDERATION PARTLY ILLEGAL—CONTRACT INTENDED TO AFFECT THE COURSE OF CRIMINAL PROCEEDINGS.

Lound v. *Grimwade*, 39 Chy. D. 605, is an illustration of the doctrine that where a contract is founded on a consideration which is partly illegal, it is void altogether. In this case the plaintiff gave the defendant's assignor a bond to secure £3,000, the consideration for which was that the plaintiff should be free from any legal proceedings or other consequences, for having introduced one Connor to the defendant's assignor, through whom he had lost money; and the plaintiff also gave the defendant's assignor a mortgage as collateral security for the bond. The action was brought to set aside the securities as having been given under duress, but the evidence, though it failed to show any duress, nevertheless established that the consideration for the securities included stipulations that certain criminal proceedings which were pending against Connor should be conducted in such a way either that the plaintiff's name should not be mentioned, or that if mentioned he should be exonerated from all blame in connection with the transaction; and it was held by Stirling, J., that

this stipulation was illegal, and that the consideration being bad in part, the securities were void altogether.

WILL CONSTRUCTION—GIFT TO CLASS—SUBSTITUTIONARY GIFT TO CHILD OF MEMBER OF CLASS WHO SHALL DIE IN TESTATOR'S LIFETIME—CHILD OF MEMBER WHO WAS DEAD AT DATE OF WILL.

In re Chinery, Chinery v. *Hill*, 39 Chy. D. 614, the construction of a will was involved. The testator had bequeathed a share of his estate upon trust to invest the principal moneys and pay the income to his sisters and nieces for life for their separate use, and after the death of each sister to apply her share for the benefit of his nieces equally upon the trust of their original shares; "and after the death of each niece, upon trust, to pay her share to each of her children as she shall by will appoint, and in default of appointment to her children equally on attaining twenty-one years, and if no such children, then on trust for the survivors or survivor of my said nieces. If my niece shall die in my lifetime her share shall be for the benefit of her child or children, but if no such children who shall attain twenty-one, then such share shall be for the benefit of my surviving nieces equally upon the same trusts." The question was whether the child of a niece who died before the date of the will was entitled, and Stirling, J., following *Christopherson* v. *Naylor*, 1 Mer. 320, and dissenting from *In re Smiths' Trust*, 5 Chy. D. 497 *n*, held that she was not; although at the same time saying that, apart from authority, the inclination of his opinion would be in favor of following the decision of the late Master of the Rolls in the latter case.

MARRIED WOMEN'S PROPERTY ACT, 1882 (R.S.O. c. 132, s. 5, s.s. 2, s. 20)—INTEREST OF MARRIED WOMAN IN FUND SETTLED ON FORMER MARRIAGE.

In re Onslow, Plowden v. *Gayford*, 39 Chy. D. 622, involves a question under the Married Women's Property Act, 1882 (R.S.O. c. 132). By a marriage settlement made in 1878, a fund was settled to pay the income to the wife for life, and during her then intended coverture, for her separate use, and after her death the fund was to be held, in default of children in trust, for such person as the wife should, during coverture by will, and when discovert by deed or will, appoint, and in default, if the wife should survive the husband, in trust for her, her executors, administrators, and assigns. The husband died in 1880, and there was no issue of the marriage. In 1887, the wife married again, and the question now raised, was whether the wife was entitled to an absolute transfer of the fund, and Stirling, J., held that she was.

MARRIED WOMAN—UNDISPOSED OF SEPARATE PERSONAL ESTATE.

In re Lambert, Stanton v. *Lambert*, 39 Chy. D. 626, may be referred to as showing a slight difference between the English Married Women's Property Act, 1882, and the R.S.O. c. 132. Under the former, as appears from this case, the husband is entitled to the undisposed of separate property of his deceased wife, as if the separate use created by the statute had never existed. But under R.S.O. c. 132, s. 23, where the wife leaves children, her undisposed of separate estate is to be distributed in the same proportions between the husband and

children, as the personal property of a husband dying intestate is distributed between his wife and children, and it is only where there are no children that the property is to be distributed as if the Act had not been passed. It is possible that in the construction of this section, however, some conflict will be found to exist between its provisions and those of R.S.O. c. 108, s. 5, which provides that the real and personal property of a married woman, as to which she dies intestate, is to be distributed as follows: One-third to her husband, if she leave issue, and one-half if she leave none; and subject thereto shall go and devolve as if her husband had pre-deceased her; probably the latter clause as embodying the provisions of a later statute, will be found to over-ride R.S.O. c. 132, s. 23, so far as it conflicts with it.

MORTGAGE—COVENANT BY MORTGAGOR—ASSIGNMENT OF EQUITY OF REDEMPTION—FURTHER CHARGE BY ASSIGNEE—RIGHT OF MORTGAGORS WHO HAVE ASSIGNED, TO RE-CONVEYANCE ON PAYMENT UNDER COVENANT.

In *Kinnaird* v. *Trollope*, 39 Chy. D. 636, a point of interest as between mortgagee and mortgagor was decided by Stirling, J., viz.: that, though a mortgagor who has assigned his equity of redemption has no right of redemption, yet if he is sued by the mortgagee on his covenant he is entitled, on payment of the amount due thereon, to a re-conveyance of the mortgaged property, and that, without paying off the amount of any further charge given by the assignee of the equity of redemption. But the mortgagees in their re-conveyance were held entitled to reserve their right of redemption in respect of the further charge.

POWER OF APPOINTMENT—CORRUPT BARGAIN INDUCING APPOINTMENT—FRAUD ON POWER.

Whelan v. *Palmer*, 39 Chy. D. 648, is a case illustrating the law of powers, and the necessity of their bonâ fide execution. In this case a man had a power to appoint a jointure not exceeding £200 in favor of his wife. He had fallen out with his wife, and was living with another woman by whom he had had a child. With a view solely to benefiting his mistress, he proposed to execute the power in favor of his wife, provided she would agree to assign thereout to the mistress £60 a year, which she did; and it was held by Kekewich, J., that the bargain was corrupt, and a fraud on the power, and therefore that the appointment was altogether void, although if it had appeared that the husband had intended to benefit his wife to any extent, the appointment might have been upheld *pro tanto*.

TRUSTEE—INVESTMENT—CONTRIBUTORY MORTGAGE—BREACH OF TRUST.

The only point decided in *Webb* v. *Jonas*, 39 Chy. D. 660, by Kekewich, J., is that in the absence of an express power, it is a breach of trust for trustees having an ordinary power to invest on real securities, to invest in a contributory mortgage of freeholds, *i.e.*, a mortgage in favor of the trustees and other persons as mortgagees.

PLEDGE—CHATTELS STORED IN ROOM—DELIVERY OF KEY—POSSESSION—BILL OF SALE.

In *Hilton* v. *Tucker*, 39 Chy. D. 669, it was held by Kekewich, J., that it is not essential to a valid pledge that the advance and delivery of possession should

be contemporaneous. In this case, in November, 1883, the plaintiff agreed to lend to one Stephen Tucker £2,500 on the security of a valuable collection of prints and engravings. On the 19th November, 1883, £1,250 was advanced on account of the loan, and it was arranged between the parties that the collection should be stored in a certain room; and on 21st December, 1883, Tucker wrote to the plaintiff, saying: "The collection has been moved in to-day; Larkin has the key, which I place entirely at your disposal." On 24th December, 1883, the balance of the loan was advanced, and on 11th January following Tucker wrote to the plaintiff: "You having advanced me £2,500, I hereby authorize you to retain possession of my collection of engraved prints now deposited by me in a certain room . . . . the key of which room is at present in your possession and power, and I hereby acknowledge that you are to retain possession of such prints, etc., until the whole of the said sum of £2,500, with interest at 5%, has been repaid to you." Tucker having died insolvent, his administratrix claimed the goods on the ground that the letter of the 11th January constituted a bill of sale, which was void under the Bills of Sale Act, ss. 8, 9. Bnt it was held by Kekewich, J., that the transaction was a pledge independent of the letters, and that the Bills of Sale Act did not apply, and that the pledge was perfected by the delivering of the key to Larkin, which amounted to a constructive delivery of the goods to the plaintiff.

SETTLEMENT—NEW TRUSTEES—NON-DISCLOSURE OF INCUMBRANCES BY RETIRING TRUSTEE—CONSTRUCTIVE NOTICE.

The case of *Hallows* v. *Lloyd*, 39 Chy. D. 685, shows that it is necessary for incumbrancers who have given notice of their claims to a trustee, to repeat the notice when new trustees are appointed, because the latter, according to the decision of Kekewich, J., in this case, are not bound by notices of incumbrancers given to the retiring trustee of which no notice appears amongst the trust documents, and which the retiring trustee fails to disclose to the new trustees.

PRACTICE—PARTICULARS—DISCOVERY—INFRINGEMENT OF TRADE MARK

In *Humphries* v. *Taylor Drug Co.*, 39 Chy. D. 693, the plaintiff sued the defendants to restrain the infringement of the plaintiff's trade mark, alleging in his statement of claim that the use of the trade mark by the defendants, was calculated to induce, and had induced, divers persons to purchase the goods of the defendants as and for the goods of the plaintiff. After the delivery of a defence denying plaintiff's allegation, the defendants applied for discovery of the names of the persons alleged to have been induced to purchase the goods of the defendants as and for the goods of the plaintiff. Kekewich, J., held that he was entitled to these particulars, notwithstanding that such persons might be called as witnesses for the plaintiff at the trial.

BILL OF SALE—AFTER ACQUIRED PROPERTY, ASSIGNMENT OF—CHOSE IN ACTION—FUTURE BOOK DEBTS.

Proceeding now to the appeal cases, in *Tailby* v. *The Official Receiver*, 13 App. Cas. 523, we find that the House of Lords have reversed the decision of the

Court of Appeal (18 Q.B.D. 25), noted *ante* vol 23, p. 63. The simple question was whether a chattel mortgage which assigned (*inter alia*) all the book debts due and owing, or which might, during the continuance of the security, become due and owing to the mortgagor, was sufficiently specific. Their Lordships held that the assignment of future book debts, though not limited to book debts in any particular business, was sufficiently definite, and passed the equitable interest in book debts incurred after the assignment, whether in the business carried on by the mortgagor at the time of the assignment, or in any other business: overruling *Belding* v. *Read* 3 H. & C. 955, and *In re D'Epineuil*, 20 Chy. D. 758, and approving *In re Clarke*, *Coombe* v. *Carter*, 36 Chy. D. 348 (noted vol. 24. p. 41).

BANKRUPTCY—REALIZATION OF ASSETS—INSURANCE ON DEBTOR'S LIFE—SUBMISSION TO MEDICAL EXAMINATION.

The Board of Trade v. *Block*, 13 App. Cas. 570, is the name by which *In re Betts* 19 Q.B.D. 39, noted *ante* vol. 23, p. 291, is known in the House of Lords. In this case the majority of the Court of Appeal (Lord Esher, M.R. and Lopes, L.J.) held (Fry, L.J., dissenting) that a bankrupt could not be compelled to submit to a medical examination for the purpose of insuring his life, in order to realize more beneficially a contingent reversionary interest to which the bankrupt was entitled, and this decision was affirmed by the House of Lords (Lord Fitzgerald dissenting). Their Lordships holding that the statutory duty imposed on a bankrupt to "do all such acts and things in relation to his property and the distribution of his property among his creditors as may reasonably be required by the trustee," and to "aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors," did not include an obligation to submit to a medical examination, and that his refusal to submit was no ground for refusing him his discharge.

"MINES AND OTHER MINERALS"—CLAY SUITABLE FOR BRICK, WHETHER INCLUDED IN "OTHER MINERALS."

It may be useful to refer to the *Lord Provost and Magistrates of Glasgow* v. *Farie*, 13 App. Ca. 657, for the construction of a statute therein contained. The question arose whether under a statute relating to waterworks companies which provided that they "should not be entitled to any mines of coal, ironstone, slate, or other minerals, under any land purchased by them," they were entitled to a bed of clay suitable for brick-making. The House of Lords reversing the Court of Session, held that common clay forming the surface or subsoil of land, was not included in the reservation in the Act.

PRACTICE—RIGHT TO APPEAL—DECREE BELOW THE APPEALABLE AMOUNT.

In *Allan* v. *Pratt*, 13 App. Ca. 780, the plaintiff sought to recover $5,000 damages, but only succeeded in recovering judgment for $1,100. An appeal by the defendant to Her Majesty in Council was allowed by the Court of Appeal for Quebec, after hearing the parties; but on the appeal coming on to be heard before the Judicial Committee, their Lordships held that the measure of value

for determining a defendant's right of appeal is the amount which the plaintiff has recovered, and where this falls short of the appealable amount the court below cannot give leave to appeal, and where such leave has been erroneously given the appeal will be dismissed: and an opportunity to apply for special leave will not be given unless the circumstances are such as in the opinion of the Judicial Committee render it proper. This case, we may observe, conflicts with the decision of the Supreme Court in *Joyce* v. *Hart*, 1 S.C.R. 321; but accords with the decision of Boyd, C., in *O'Donohoe* v. *Whitty*, 9 P.R. 361.

STATUTE OF LIMITATIONS—RELINQUISHMENT OF POSSESSION BY INTRUDER.

It will be useful to notice *The Trustees, Executors and Agency Co.* v. *Short*, 13 App. Ca. 793, which, though an appeal from New South Wales, is in reality a decision on the effect of the English Statute of Limitations (3 & 4 W. 4, c. 27), which has been adopted in that colony. In this case the Judicial Committee held that the statute does not continue to run against the rightful owner of land after an intruder has relinquished possession without acquiring title under the Act. Their Lordships adopt the doctrine laid down by Parke, B., in *Smith* v. *Lloyd*, 9 Ex. 562, where he says: "We are clearly of opinion that the statute applies, not to want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute." In short, their Lordships held that where an intruder goes out of possession and no one else goes in, the possession revests in the rightful owner without the necessity of an actual entry by him.

R.S.O. c. 135, ss 2, 3—COMPENSATION IN RESPECT OF DEATH—MEASURE OF DAMAGES—POLICY OF INSURANCE.

In *The Grand Trunk R. W. Co.* v. *Jennings*, 13 App. Case 800, is an appeal from the decision of the Court of Appeal, Ontario, in which the same question was raised as in *Beckett* v. *The Grand Trunk R. W. Co.*, 13 App. R. 174, affirming the same, case 8 Ont., 601. The action was brought under what is known as Lord Campbell's Act, by a widow for causing the death of her husband. A policy of insurance for $2,000 on the life of the deceased was in force, to which, on his death, the plaintiff became entitled, and the question arose whether the amount of this policy should be deducted from the damages. In *Beckett* v. *The Grand Trunk Ry. Co.*, the majority of the Queen's Bench Division (Armour and O'Connor, J.J.) were of opinion that it should not be deducted; Wilson, C. J., thought it should. In the Court of Appeal the judges were divided in opinion, Hagarty, C.J.O., and Osler, J.A., agreeing with Wilson, C.J. Burton, J.A., on the other hand, agreed with Armour and O'Connor, J.J., while Patterson, J.A., though thinking the receipt of the insurance is a proper matter for the consideration of the Court or jury in estimating the damages, and might afford some ground for reduction from a gross assessment, was nevertheless of opinion that there was nothing shown to warrant any reduction. The result was the affirmance of the judgment of the Queen's Bench Division. Their Lordships of the

Judicial Committee have now affirmed this decision, holding that where the deceased had made provision for his widow, by a policy of insurance on his life in her favor, the amount of such policy is not to be deducted from the amount of damages previously assessed irrespective of such consideration, because she is benefited only by the accelerated receipt of the amount of the policy, and that benefit being represented by the interest of the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of the deceased. Lord Watson, who delivered the judgment, says at page 804: "It appears to their Lordships that money provisions made by a husband for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in estimating the loss; but the extent, if any, to which these ought to be imputed in reduction of damages, must depend upon the nature of the provision, and position and means of the deceased.

PRACTICE—JUDGES' NOTES OF EVIDENCE—APPEAL—IMPROPER CONCEALMENT OF MATERIAL FACTS.

The only remaining case to be noted is *Bandanis* v. *Liquidators of Jersey Banking Co.*, 13 App. Case 832, in which the Judicial Committee decide that where judges' notes of evidence are mere private memoranda, and are not taken in pursuance of any law or practice requiring them to be taken, that it is improper to use them before a Court of Appeal. The Court therefore refused an application for an order to the judge appealed from, to transmit his notes of the evidence. Their Lordships also held that when an appellant had, on applying for special leave to appeal, improperly concealed from their Lordships the ground on which the appeal had been refused in the Court below, that a subsequent application for leave to adduce further evidence must be refused, as nothing should be done to assist an appeal so instituted.

Notes on Exchanges and Legal Scrap Book.

TAX SALES.—The change in the mode of conducting tax sales introduced in Manitoba, is said to work well. We have still in Ontario what is popularly known as the "Dutch Auction" plan. It is thought by many that our system is objectionable, as tending to promote mere speculation and to retard settlement or improvement of the land. An attempt was made in the Ontario House to effect a change, and the movement had the endorsation of a large number of County Councils, but the Bill did not pass. The change was, however, made in Manitoba; and there they sell the whole of the land for what it will bring, but only require to have what is due for taxes, interest, and costs of sale paid down, the balance to be paid only where the land is not redeemed and an absolute deed given. The balance is held for the owner, and is payable to him on a judge's order. The municipality under this system gets rid of some troublesome book-keeping, and of a bad tax payer, whilst the tax purchaser has not to wait perhaps half a lifetime in order to get, bit by bit, a sufficient quantity of land to be worth settling on.

Correspondence.

LAW SOCIETY APPOINTMENTS.

To the Editor of THE CANADA LAW JOURNAL:

Dear Sir,—The ambiguity in the form of the notice in use by the Law Society, when advertising for applications from members of the Bar for any office in its gift, must have struck your readers, or those interested, as being very singular. The following is a skeleton copy of one of such notices:

> Applications will be received by the Secretary of the Law Society, at Osgoode Hall, until twelve o'clock noon of . . . day, . . . next, from members of the Bar desirous of being appointed to the office of . . .
>
> No application is to be made to any Bencher on the subject.
>
> J. H. ESTEN, *Secretary Law Society.*

From this no one can be certain whether the appointment is in the gift of the Secretary, or of the Society, or the Benchers. And suppose that in the course of time another Secretary, not quite so much like Cæsar's wife, in matters of fair play, as the present incumbent, should be in office; and he should take it into his head to suppress the application of any one distasteful to him, and allow only those in favor to go before the Benchers, the mode of application here required is admirably adapted to any such operation. Again, the warning against applicants speaking to any Bencher "on the subject" can only be partially effectual. How is a breach of it to be detected? Would it not be better to notify intending applicants that their applications should be in writing, addressed to "the Benchers," care of the Secretary, and sent sealed up, to be opened by the Benchers on day of meeting to make appointment, or other day to be appointed for the purpose? I hope, at all events, that the Law Society will have this notice remodelled, so that it will be less objectionable than it is in its present form.

BARRISTER.

Proceedings of Law Societies.

ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE COUNTY OF YORK LAW ASSOCIATION FOR THE YEAR 1888.

To the Members of The County of York Law Association:

GENTLEMEN:—The Trustees, in presenting their Third Annual Report to the Association, again take pleasure in reporting that the affairs of the Association are in a prosperous condition. There has been a large addition to the membership during the year, sixty-six new members having subscribed for stock.

Since the last annual meeting, the Report of the Joint Committee of the Law Associations has been embodied in the new Rules of Practice, and since their

promulgation a sufficient time has elapsed to make it plain to the Profession that these rules have simplified practice and are a well attempted effort to bring about more effectually the fusion aimed at by the Judicature Acts.

The strong recommendation of the Joint Committee, which provided for the fixing definitely the mode of trial before trial, has not been adopted in the rules. It is understood that the Judges in dealing with this recommendation in so far as it relates to trial by jury, apart from the question of *ultra vires*, have deemed it expedient to interfere with the expressed wish of the Legislature embodied in the 76th and following sections of the Judicature Act.

The trustees suggest that a representation be made to the Attorney-General upon this subject, and that legislation be asked to carry the recommendation of the Joint Committee into effect.

The important question of the establishment of a permanent circuit list which will bring about a more complete fusion of the divisions of the High Court, will receive the further consideration of the Joint Committee of the Judges and the Law Associations. This Joint Committee have agreed to the suggestion that two Judges shall sit in each week before whom motions may be brought according to the following scheme, without regard to the divisions in which the papers relating to such motions may be styled :

	MONDAY.	TUESDAY.	WEDNESDAY.	THURSDAY.
DIVISION A.....	Chambers	Court Motions	Appeals from Reports	Court Motions
DIVISION B.....	Court Motions	Chamber Appeals	Court Motions	Chambers

This scheme is now before the Supreme Court of Judicature for consideration.

This committee have also suggested that the minor differences of practice in the offices of the various divisions at Osgoode Hall should be brought to the attention of the Attorney-General, and that he should be requested to designate some officer to whom such differences in practice should be referred for arrangement so as to ensure conformity.

The question of the increase of judicial salaries has been lately pressed upon the authorities. That an increase should be made is freely submitted, and the Trustees hope that during the next sittings of Parliament a measure will be passed for this purpose.

The Trustees have endeavored during the past year to expend the available funds in the purchase of books most needed by members. The daily attendance in the Library is now however so large, and the demands for books are so varied, that the Trustees cannot expect the collection of books will anything like answer requirements for years to come.

During the year nothing whatsoever has been done to remedy the scandalous condition of the present Court House, nor has any effort been made by the city

to comply with the statutory requirements imposed by the Act passed during the session of 1887.

It was the duty of the corporation forthwith, after the passing of that Act, to proceed with the erection of a new Court House, so as to complete the same before the 26th of June, 1889.

No attempt has been made to comply with that duty. The attention of the Mayor and Council has been called to this matter, and the following resolution passed by the Trustees has been transmitted to them:

"That whereas it was the duty of the corporation of the City of Toronto to commence forthwith after the passing of the Act 50 Victoria, Chapter 72, and proceed with the erection of a new Court House in the City of Toronto, and whereas the work has not been proceeded with.

"Resolved, that the attention of the Mayor of the City of Toronto be directed to the provisions of the Act, and that he be urged to forward the erection and completion of the Court House, and that in default of such work being forthwith commenced and actively prosecuted, such proceedings by way of indictment and otherwise be taken, as may be advised, to compel the performance of the duties imposed by the Act."

It is understood that a measure is to be introduced during the present sittings of the Legislature for the division of the City Registry Office. The following resolution passed by the Trustees has been transmitted to the Attorney-General:

"Whereas under the system of registration which is at present in force in the City of Toronto, the lands within the said City are divided into park lots containing one hundred acres each and town lots of smaller area, upon which respective park lots or town lots all instruments affecting the lands therein contained are registered, until the owners of said lands choose to register plans relating to their holdings;

"And whereas in many instances no plans have been registered upon the said park lots or town lots or upon considerable portion thereof, by reason whereof it is necessary that each person who is called upon to search the title to the smallest portion of the said lands shall peruse all instruments registered upon the said park lots or town lots, for the purpose of ascertaining whether they or any of them affect the title to the particular lands in question, which instruments in many cases amount to several thousands in number, and to peruse which necessarily consumes a great amount of time and involves the incurring of great risk and expense.

"And whereas it is expedient that the Registry Laws and the Registry Offices should be framed and regulated as to afford the greatest possible facilities to persons searching titles to land;

"Be it therefore resolved that in the opinion of this Board, before any subdivision of the Toronto Registry Office be made, the grievances aforesaid should be removed by legislation providing for the subdivision of all the lands in the City of Toronto into small blocks or sections;

"And providing for the preparation of abstract indices in books of convenient

size relating to the said subdivisions, each of which abstract indices shall extend from the Crown Patent onwards and shall contain those registrations only that affect the subdivision to which the said abstract index relates.

"And providing that whenever a plan of any lands has been or may be registered in the said Registry Office, an abstract index shall be prepared in abstract books of convenient size relating to the lands comprised within the said plan, which abstract index shall extend from the Crown Patent onwards and shall contain those registrations only that affect the lands comprised within the plan to which the said abstract index relates :—

"And providing that the said abstract indices shall with reference to each instrument therein mentioned, indicate as concisely as may be the lands which are by the said instrument affected ;

"And providing for the duplication or further multiplication of the said abstract indices as convenience shall require ;

"And be it further resolved that in the opinion of this Board the above mentioned reforms can be better secured by the continuance of the existing system of registration under the Registry Act presided over by a single Registrar, than by a subdivided system and a multiplication of offices."

The Trustees, under the powers conferred upon them by the Declaration of Incorporation, and in obedience to a request made by the Libraries Aid Committee of the Law Society, at a meeting of the Board held on the 3rd day of November last, altered By-Law Number Twenty-Six of the Association by striking out the words "first Monday in February" in the second line thereof, and inserting in lieu thereof the words "last Monday in January," and this alteration is submitted for approval at the next general meeting of the members pursuant to the provisions of the Declaration of Incorporation.

The Trustees record with great satisfaction the high opinion they continue to entertain of the services of the Librarian.

One member of the Association, Mr. James Maclennan, Q. C., the Vice-President elected at the last annual meeting, was appointed a Justice of the Court of Appeal during the year.

The Trustees record with deep regret the death of one member during the year, Mr. W. A. Foster, Q. C.

The Historian of the Association has during the year published his Lives of the Judges, a most valuable contribution to the History of the Dominion.

At the date of the last Annual Report the Association numbered 256 members. There are now 314 members.

The particulars required by the By-Laws accompany this Report, being :

1. The names of the members admitted during the year.
2. The names of the members at the date of this report.
3. A list of the books contained in the Library.
4. A list of the books added to the Library during the year.
5. A list of periodicals received during the year.
6. A detailed statement of the assets and liabilities of the Association at the

date of this Report, and of the receipts and disbursements during the year.

The Treasurer's accounts have been duly audited, and the Report of the Auditors will be submitted to you for your approval.

January 27th, 1889.

WALTER BARWICK,
Treasurer.

J. K. KERR,
President.

THE COUNTY OF YORK LAW ASSOCIATION.

Treasurer's Statement for the Year ending 31st December, 1888.

DR.			CR.		
FOLIO			FOLIO		
23	Carswell & Co., on act. of			Balance of Cash on hand,	
29	Reports and Statutes, Text			Dec. 31st, 1887	$87 73
	Books, Periodicals, Sub-		2	Stock Subscriptions	290 00
	scriptions, etc	$850 00	6	Annual Fees	542 00
33	Williamson & Co., Periodicals	68 50	21	Annual Grant from Law	
37	Rowsell & Hutchinson,			Society	505 00
	Binding	25 40	21	Grant from Law Society—	
29	Miscellaneous Text Books	16 59		half Librarian's Salary for	
41	Furniture account	8 50		the year	145 00
44	Salaries, Printing, Expenses,		15	Cash Donations from Mem-	
	etc	569 18		bers	25 00
33	Ontario Gazette	4 00	141	Interest on Bank Deposits	15 73
	Balance on hand	68 29			
		$1,610 46			$1,610 46

Statement of Assets and Liabilities on the 31st December, 1888.

ASSETS.		LIABILITIES.	
Reports and Statutes	$3,244 86	Stockholders	$1,595 00
Text Books	1,286 62	Carswell & Co	192 42
Periodicals	377 00	Profit and Loss Account	3,253 40
Furniture	64 05		
Cash in Bank	68 29		
	$5,040 82		$5,040 82

PROFIT AND LOSS ACCOUNT—1888.

DR.		CR.	
Expenses	$569 18	Balance, 31st December, 1888	$2,589 85
Balance	3,253 40	Annual Fees	542 00
		Law Society—Annual Grant	505 00
		Do half Librarian's Salary	145 00
		Donations	25 00
		Interest	15 73
	$3,822 58		$3,822 58

Toronto, December 31st, 1888.

WALTER BARWICK.
Treasurer.

DIARY FOR MARCH.

1. Fri.....St. David.
3. Sun .....*Quinquagesima Sunday.*
5. Tue .....Court of Appeal sits. Gen. Sess. and Co. Ct. Sittings for trial in York. Holt, C. J., died 1710 æt. 65.
6. Wed .....Ash Wednesday. First day of Lent. York changed to Toronto, 1834.
10. Sun .....*Quadragesima Sunday.*
13. Wed.....Lord Mansfield born 1704.
17. Sun .....*2nd Sunday in Lent St. Patrick's Day.*
18. Mon .....Arch. McLean 8th C. J. of Q. B. 1862.
24. Sun .....*3rd Sunday in Lent.*
28. Thu .....Lord Romilly appointed M. R. 1851.
30. Sat.....B. N. A. Act assented to 1867. Reformation in England began 1534
31. Sun .....*4th Sunday in Lent.*

Early Notes of Canadian Cases.

EXCHEQUER COURT OF CANADA.

BURBIDGE, J.] [Feb. 5.

MAGAN *v.* THE QUEEN.

Tariff act, sched. C.—Timber cut to order.

By item (Departmental No. 726, Schedule C of the Tariff Act, it is provided that the following articles shall be admitted into Canada free of duty, that is to say :—

"Lumber and timber, plank and boards, sawn of boxwood, cherry, walnut, chestnut, gumwood, mahogany, pitch pine, rosewood, sandalwood, Spanish cedar, oak, hickory and whitewood, not shaped, planed, or otherwise manufactured, and sawdust of the same, and hickory lumber sawn to shape for spokes of wheels, but not futher manufactured."

The plaintiff having entered into a contract with the Grand Trunk Railway Company to supply the company with a certain quantity of white oak plank and boards, and white oak lumber of specified thicknesses, widths and lengths, arranged with certain millmen in the State of Michigan to saw such plank, boards and lumber from the log, in accordance with orders given to them by the plaintiff. The plank, boards and lumber were intended to be used principally, but not wholly, for the construction of cars and railway trucks, and they were ordered to be sawn and were in fact sawn of such thicknesses, widths and lengths as to admit of them being used in such construction without waste of material. The lengths called for by the contract varied, the shortest being two feet two inches, and the invoices on which duty was collected and paid under protest indicated that the lumber when imported was cut to these exact lengths. But the fact as proved by the plaintiff and not denied by the defendant, no witnesses for the Crown being called, was that while the invoices disclosed the correct quantity of material imported, there being in each importation the equivalent of the number of pieces shown in the invoice, they did not show accurately the shape of the different pieces, and that, with perhaps a few unimportant exceptions, the lumber was imported in lengths in which it would be commercial or merchantable : care being taken only that the lengths would be such that the lumber could in Canada be sawn into the shorter and specified lengths without waste.

With reference to the lumber it was proved that after it had been cut to the specified lengths the pieces could not be used in the construction of cars without being recut and fitted.

For the Crown it was contended that the sawing of the lumber from the log at the mill of such thicknesses, widths and lengths, that it could be recut in specified lengths so as to be used for a specific portion of a car was a shaping of the lumber within the exception contained in the item (726) of the tariff referred to.

On the other hand the plaintiff contended that this did not amount to a shaping within the meaning of the statute ; that if, as did not appear to be denied, the lumber in question, in the shape and condition in which it was, would be free of duty if imported for general purposes, or for no definite purpose, it would not become dutiable because its length was such that it could be conveniently and without waste cut up and used for a specific purpose, and that the importer, in giving his order to the millman, had this in view ; that a piece of white oak lumber could not at one and the same time be shaped or not shaped, dutiable or not dutiable, according to the use to which it was to be put. Parliament not having enacted, as it had done in other cases, that the article should be dutiable or not according to the use to which it was intended to be applied by the importer or his customers ; as for instance, that a white oak plank thirty feet long, which being imported for no specific purpose, or for general purposes, would be free of duty,

would not become dutiable because the importer intended to cut it into five pieces six feet long, each of which was adapted to and intended to be used for some specific purpose.

Held, that the plank, boards and lumber in question, in the form in which they were imported, were not shaped within the meaning of the statute, and that they were not dutiable.

Judgment for the claimant.

McCarthy, Q.C. (with whom was *C. Robinson*, Q.C., and *H. A. Mackelcan*), for the claimant.

Sedgewick, Q.C., and *Hogg*, for the defendant.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

SUTHERLAND *v.* COX.

Stock-brokers—Agreement to buy and carry stock on margin—Failure to purchase.

Plaintiff employed F. as his broker to purchase shares in Federal Bank stock, and to carry the same for him until 1st December on margin, depositing with him a large sum of money for that purpose.

F. transferred his business to the defendants in July, and with it paid over to them the whole of the money which had been left in his hands by the plaintiff, and they assumed F.'s contract with the latter. On the 10th of August they informed him of this by letter, stating: "We took over your 500 Federal from Farley on the 19th July," etc. On the 12th October the defendants called upon plaintiff to put up $2,000 additional margin, the stock having fallen in value; and on default they professed to sell for him, and represented to him that they had sold his shares at a loss, and charged him with the difference thereon—upwards of $2,000.

It appeared that F. had never bought shares for the plaintiff; that he had not transferred, and that the defendants had never received any shares from him for the plaintiff. The alleged sale of these shares with the loss or difference on which the defendants had charged the plaintiff was a mere pretence, defendants never having had any shares of the plaintiff to sell; and the broker, with whom he had under the arrangement to become the pretended purchaser, having bought none from him.

Held, that the plaintiff was entitled to recover the money he had deposited with F., and which the defendants had received from him as money had and received.

A contract by a broker to purchase stock for a customer is not satisfied by the broker holding himself liable to account for the market value of the stock when the customer calls upon him to do so, or then purchasing stock to comply with the demand.

If any such custom existed among brokers, of which there was not any evidence, it would not be binding on his client unless he knew of it, and specially submitted to its conditions.

Judgment of the Court below affirmed.

MOLSONS BANK *v.* MCMEEKING.

Division Court Act, R.S.O. (1877), *c.* 47, *ss.* 163, 165, 166, 168, 221—*Transcript of judgment to County Court—Division Court execution—Return of nulla bona after expiration of writ—R.S.O.* (1887), *c.* 51, *ss.* 220, 223, 224, 226, 380—*Third party moving to set aside judgment.*

The plaintiffs recovered judgment in the Division Court and issued an execution thereon, under which nothing was made, and which expired by lapse of time. At the request of the plaintiff's solicitor the bailiff returned the writ *nulla bona*, although it was alleged that there were goods out of which the debt might have been levied. Upon this return the plaintiffs procured a transcript of his Division Court judgment in regular form, and filed the same in the office of the clerk of County Court, and sued out a writ of *fi. fa.* goods in order to obtain the benefit of the provisions of the Creditors' Relief Act.

The respondent, S., the holder of a warrant of execution in the Division Court, then moved to set aside the plaintiff's proceedings, and they were accordingly set aside by the County Court Judge on the ground that the judgment in the County Court was void, being founded on a return to an expired execution:

Held, that a return of *nulla bona* where there were goods was no more than an irregu-

larity to be complained of by the defendant.

Ontario Bank v. *Kirby*, 16 C.P. 35, followed.

Nor could a third party object that such return was made at the instance of the solicitor of the plaintiffs.

Held, also [reversing the judgment of the County Court], that a return of *nulla bona* could be properly made after the expiration of the writ, and that the transcript and judgment in the County Court founded thereon were valid and regular.

MERCHANTS' BANK *v.* LUCAS.

Bill of exchange—Forgery—Ratification.

H.Y., after having for some time carried on business as "The Hamilton Cotton Co.," in partnership with the defendants, retired from the company and entered their employ as general manager, blank drafts, etc., signed by the company, being placed in his hands for the financial purposes of the company. In June, 1883, H.Y., for his own purposes, drew in the name of the defendants on M. at Montreal, for $2,760, which was discounted by the plaintiffs and the draft sent by them to Montreal for acceptance. The same was duly honored by the drawee, and would mature on the 28th of September. About a month before the maturing thereof, H.Y. waited on the bank authorities and requested them to recall the draft, alleging that the company were settling with the acceptor. On the same day, the solicitor for the company obtained from H.Y. an order or letter addressed to the defendants, informing them of the fact of his having so used their name on the draft, and requesting them to retire and charge the same to his account, and as it had been discounted for his accommodation and proceeds applied to his own use, they (defendants) should not pay any part of it.

Shortly afterwards the defendants on distinct occasions called at the bank, L. asking to be shown the draft, which was handed to and closely examined by him, and when asked why he was so critical in his examination, answered that the signature of I.M.Y. was usually not so shaky, that he would call in a day or two and see if the draft was taken up. I.M.Y., on visiting the bank after examining the draft very carefully, when he was asked by one of the officers of the institution if he would send a cheque for it, answered it was too late that day, but would send a cheque the following day. No cheque was sent, however, and on or about the 15th September the manager of the bank and the bank's solicitor called to see I.M.Y., and asked why the cheque had not been sent by him, when he admitted having promised to send such cheque; that at the time he had thought he would send it, and could not say why it had not been sent. He declined to say whether or not the signature to the draft was his. H.Y. subsequently left the country. It was shown in evidence that at the time the draft was returned, and for some time afterwards H.Y. had a large amount to his credit in the books of the firm, and continued to have a balance to his credit until after the present action was commenced.

Held, [reversing the judgment of the C.P.D. 13 O.R, 520] that the conduct of the defendants was not such as to preclude them from setting up the defence of forgery.

Semble, the act of forgery not being an act professing to have been done for or under the authority of the person sought to be charged, is incapable of ratification.

HAGARTY, C.J.O., dissenting.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

FERGUSON, J.] [Jan. 4.

TOWNSHIP OF NORTH DORCHESTER *v.* COUNTY OF MIDDLESEX.

Municipal corporations—Duty of erecting and maintaining "bridges over rivers"—R.S.O. c. 184, s. 535.

Section 535 of the Municipal Act, R.S.O. c. 184, provides that "it shall be the duty of County Councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities (other than in the case of a city or separated town) within the county."

The question in this action was whether the bridges over Doty's Creek, Kettle Creek, and Caddy's Creek, each of which is a stream crossing a boundary line between two town-

ship municipalities, were "bridges over rivers" within the meaning of the enactment.

At Doty's Creek, the span of the bridge was sixty-seven feet; at Kettle Creek, thirty-one feet nine inches; and at Caddy's Creek nine feet. The evidence showed that at Caddy's Creek a culvert would be sufficient.

Held, that the bridges over Doty's and Kettle Creeks were "bridges over rivers" within the meaning and intention of the statute, and that the duty of erecting and maintaining them rested upon the County Council; but that the bridge over Caddy's Creek was not such a bridge.

McHardy v. *Ellice*, 1 A.R. 628, applied, notwithstanding changes in the statute, and followed.

W. R. Meredith, Q.C., for the plaintiffs.

Purdom, for the defendants.

Boyd, C.] [Nov. 19, 1888.
Div'l Court.] [Feb. 4, 1889.

Hands *v.* Law Society of Upper Canada.

Barrister and solicitor—Professional misconduct—Exercise of disciplinary jurisdiction by Law Society—R.S.O. c. 145, *ss.* 36, 44*—Constitution of discipline committee—Evidence under oath—Action at law by complainant—Question whether wrongful acts done in professional character—Restitution—Waiver.*

The plaintiff, a barrister and solicitor, was charged before the Benchers of the Law Society with professional misconduct in his dealings with certain shares of bank stock entrusted to him by a young woman. The charges were referred to the Standing Committee of the Benchers on Discipline, who inquired and reported to the Convocation of Benchers. Convocation adopted the report and resolved that the plaintiff "is unworthy to practice as a solicitor, and that he be disbarred as a barrister." This action was brought to have the resolution declared void, and to restrain the defendants from taking further proceedings under it. The plaintiff objected to the proceedings of the committee and of Convocation as illegal, defective and improper.

Held, per Boyd, C., the trial Judge, that the Discipline Committee was properly constituted without notice of its meetings being given to the Treasurer of the Law Society, who was an *ex officio* member of all standing committees, but who was absent from Canada at the time; and that no valid objection arose from the fact that the other members of the Committee, though notified of the meetings, were not advised of the particular business they were called to transact; and at all events any cause of complaint as to procedure was removed by the fair and just conduct of the final proceedings before Convocation at large, where the plaintiff had ample opportunity to explain and to defend himself.

2. It is not essential to the jurisdiction of domestic tribunals, that they should have the powers of ordinary courts of justice in the trial of litigated matters. R.S.O. c. 145, s. 36, is not imperative; it confers the power to examine witnesses under oath, which may or may not be employed according to the sound discretion of the particular tribunal. Where there is or is likely to be any conflict in the evidence, the witnessses should be sworn. But in this case the salient facts were not controverted by the plaintiff; his counsel stated in his presence that he did not know that he could differ from the conclusions which the Committee had come to; and the evidence derived from admissions of a party is sufficient to found even a decree of the Court. The objection that the Discipline Committee had taken evidence without oath, therefore, failed.

3. The intervention of the Law Society, upon the solicitation of the person aggrieved, was quite warrantable, notwithstanding that such person had brought an action for pecuniary redress.

4. The jurisdiction of the Law Society should not be less than that of the Court; and the latter is exercised not merely in cases arising out of purely professional employment, but whenever the transaction is so connected with the professional character of the solicitor, as to afford a presumption that that character formed a ground and reason of the employment. It is for the Benchers to determine and adjudge what is and what is not becoming conduct in a member of the Society, under R.S.O. c. 145, s. 44; and any act of any member that will seriously compromise the body of the profession in public estimation is within the province of this law. Any misconduct which would prevent a person from being admitted

to the Society justifies his removal: and the conduct which unfits a man to be a solicitor should *a fortiori* preclude his being a barrister. The plaintiff, according to his own statements before the Committee, was acting as a solicitor in the transactions complained of; and the objection that he was not engaged in that capacity, or in the capacity of barrister, failed.

5. The fact that the plaintiff, prior to the resolution of the Benchers, had made restitution to the complainant, did not oust the jurisdiction to discipline.

Certain minor objections to the proceedings were also overruled and the action dismissed by the trial Judge.

Held, however, by the Queen's Bench Divisional Court, on appeal, FALCONBRIDGE, J., dissenting: 1. That the report of the Discipline Committee and the proceedings of Convocation founded upon it were irregular because of the failure to notify the Treasurer of the meetings and to notify the members generally of the particular business for which they were called together; and as the form of the notice was not known to the plaintiff he could not be taken to have waived any right to object.

2. That by the provisions of R.S.O. c. 145, s. 36, the Legislature intended that the evidence in inquiries such as the one in question should be taken upon oath; and it was not intended not to confer upon the defendants a discretion to take it upon oath or without oath as they should think proper; and they could not by arrangement between themselves and plaintiff, adopt a different mode of obtaining the facts than that which the Legislature prescribed in conferring their authority upon them.

Upon the grounds therefore of irregularity in calling the Committee together, and illegality in not taking the evidence under oath, the Court reversed the decision of BOYD, C., and gave judgment for the plaintiff.

C. J. Holman, for the plaintiff.

W. A. Reeve, Q. C., and *Walter Read*, for the defendants.

STREET, J.] [Jan. 15.

ANDERSON *v.* GLASS.

Bankruptcy and insolvency—Assignment for benefit of creditors—Assignee not a sheriff—Requisite number of creditors not assenting—R.S.O. c. 124, s. 3, ss. 2, construction of—Chattel mortgage—Jus tertii—Costs.

The meaning of R.S.O. c. 124, s. 3, ss. 2, is that an assignment executed without the consent of the requisite number of creditors shall have the same effect as if it had been executed with such consent until and unless it be superseded by an assignment executed with such consent; and the words which occur through the Act, "an assignment for the general benefit of creditors under this Act," are to be governed by this construction.

Held, therefore, that a sheriff who had seized goods of insolvent debtors under execution was not justified in refusing to give them up to the debtors' assignee, who was not a sheriff, and the assignment to whom had not been assented to by the number of creditors required by R.S.O. c. 124, s. 3; but

Held, that as the goods were covered by a chattel mortgage, the sheriff could set up the rights of the mortgagee in answer to an action by the assignee to restrain the sale of the goods under the execution.

The assignee having failed in the action, because the mortgagee's rights disentitled him to succeed; and the sheriff having contested the assignee's rights on the other ground, which was declared to be untenable, no costs were given to either party.

Q.B. Div'l Court.] [Feb 4.

COUSINEAU *v.* CITY OF LONDON FIRE INSURANCE CO.

Costs—Taxation—Lapse of appointment and taxation—Long vacation—Notice of taxation—Revision—Fund in Court—Rule 1207.

The plaintiff's costs were being taxed by one of the taxing officers at Toronto, when he applied to stop the taxation in order that he might have the order for taxation varied. The taxation was stopped, the officer gave up to the plaintiff the bill of costs, which he had brought in for taxation, and nothing further was done.

Held, that the effect of this was that the appointment to tax and the taxation lapsed, and no further proceedings could have been had without a fresh appointment; and therefore the taxing officer was not thereafter seized of the taxation, and the local Registrar in whose office the action had been begun

and was pending, could properly issue his appointment and tax the plaintiff's costs.

Held, also, that the taxation was properly had during the long vacation. The defendants objected that they had not a reasonable notice of the taxation by the local Registrar, but did not ask for an enlargement of it, relying instead on objections they took to its proceeding at all, in letters to the plaintiff's solicitors and to the local Registrar, and the taxation proceeded in their absence.

Held, that having taken the risk they must also take the result. A certain sum of money had been paid into Court as security for the defendant's appeal to the Court of Appeal, which was afterwards abandoned; and by an order made on the consent of both parties it was provided that the plaintiff's costs should be paid out of this money after taxation.

Held, ARMOUR, C. J., dissenting, that this money was a fund in Court within the meaning of Rule 1207, and there should be a revision by one of the taxing officers at Toronto of the taxation of costs by the local Registrar.

Per ARMOUR, C. J., the object of Rule 1207 was for the protection of a fund in Court, where the parties to the taxation of costs payable thereout were none of them sufficiently interested in the fund in Court to protect it.

T. Langton, for plaintiff.

C. Millar, for defendant.

Q.B. Div'l Ct.] [Feb. 15.

BARTLETT *v.* THOMPSON.

Landlord and tenant—Overholding Tenants' Act—Dispute as to date when tenancy commenced—"Color of right."

The proceedings were removed from before the Judge of the County Court of Oxford under the Overholding Tenants' Act, R.S.O. c. 144, and a motion was made by the tenant to set aside the proceedings and the writ of possession granted by the County Judge to put the landlord in possession. The dispute between the parties was as to whether the tenancy began on the 1st or 15th of October. If it began on the 1st, sufficient notice to determine the tenancy had not been given by the landlord.

Held, that there being a dispute between he parties as to the tenancy, there was that "color of right" which the Act contemplated, and the County Judge should have dismissed the case.

Price v. *Guinane*, 16 O.R. 264, approved and followed.

Wallace Nesbitt, for the motion.

C. J. Holman, contra.

Chancery Division.

Div'l Ct.] [Dec. 14, 1888.

DALZIEL *v.* MALLORY.

Tax sale—Duties of clerk and assessor—Omission to comply with R.S.O. (1887), *c.* 193, *s.* 140—*Curative effect of R.S.O. c.* 193, *ss.* 188, 189.

A lot of land was sold for taxes in 1882, the deed being made in 1883, and an action of ejectment was brought by the purchaser against the owner in 1888. On the trial it was proved that the list of lands required by sec. 140 of R.S.O. (1887), c. 193, was sent by the treasurer to the clerk of the village in which the land was situate, but that it was then lost; and, although the land was occupied, it was not returned "as occupied," nor was the owner notified that it was liable to be sold for taxes, as provided for by sec. 141.

Held [affirming MACMAHON, J.; BOYD, C., dissenting], that the sale was irregular and could not be sustained, and that the defect was not cured by secs. 188 and 189.

Haisley v. *Somers*, 13 O.R. 600; and *Fenton* v. *McWain*, 41 N.C.R. 239, referred to.

Per BOYD, C., dissenting. The omission to raise within the proper time the objection that sec. 141 was not complied with, is cured by sec. 189, and the deed is valid and binding. That section is in the nature of a statute of limitations as to such objections. The decision of the majority of the Court is reached by giving a construction to sec. 163, which in effect adds to the language of the statute, and in so far invades the distinction which ought to obtain between making and administering law.

Haisley v. *Somers*, *supra*, distinguished.

Aylesworth, for the plaintiff.

J. K. Kerr, Q.C., for the defendant.

BOYD, C.] [Jan. 9.

Re POLTON, *et al, and* SWANSTON.

Vendor and purchaser—R.S.O. (1887), *c.* 112—*Production of deeds—Evidence of trusts by recital in memorial twenty years old—Discharge of mortgage—Mortgage in fee by tenant for life—Necessity of discharge after death of life tenant.*

In an application under the Vendor and Purchaser Act, R.S.O. (1887), c. 112, in which the contract of the sale provided that the vendors should not be bound to produce any deeds or evidence of title, except such as they might have in their possession, but should show a good title, etc., it appeared that A. P., by an indenture of January 16th, 1858, conveyed the lands in question to trustees on certain trusts, which deed was registered by memorial not containing the trusts; by deed of appointment, dated July 4th, 1862, made in pursuance of the deed of 1858, also registered by memorial, which purported to contain a full copy of the deed in which were recitals which set out what purported to be the trusts of the former deed, and showed a life estate in A. P. with power of appointment after; A. P. appointed to trustees who were represented by the vendors, with directions to sell after his death, which had recently occurred; neither of these deeds was in the possession or power of the vendors, the trustees.

Held, that the vendors were not bound to produce the two deeds of January, 1858, and July, 1862; and that the production of the memorial of the latter being twenty years old, reciting the trusts of the former was sufficient evidence of what those trusts were, and as there was an absolute trust for sale the purchaser should take the title.

A. P., in 1873, assumed to mortgage the lands in fee, and died in 1887.

Held, that the mortgage only bound his life estate, and that the vendors were not bound to procure a discharge thereof. The objections of the purchaser were therefore overruled, and the vendors held to have shown a good title.

E. D. Armour, for vendors.

No one for purchaser.

ROBERTSON, J.] [Jan. 25.

Re CENTRAL BANK: CAYLEY'S CASE.

Winding up—Proof of claim—Cheque accepted by Bank after suspension—Set off—Subsequently accrued liability of drawer of cheque—Fraudulent preferences.

On November 15th, 1887, Donovan gave his cheque on the Central Bank, payable to Cayley, for $3,440. Cayley forthwith deposited the cheque in the Dominion Bank, and the latter advanced him $3,000. The Central Bank suspended payment on November 16th, 1887; and, in afterwards filing their claim in the winding up proceedings, the Dominion Bank included the amount of this cheque. On November 23rd, 1887, the Central Bank had marked the cheque good, and charged it against Donovan's account, leaving a balance of $30 in his favor, and crediting the Dominion Bank with the amount of the cheque. Meanwhile Donovan became indebted to the Central Bank on some promissory notes, and the liquidators objected to allow the item of the above cheque for $3,440 in the Dominion Bank claim as filed; thereupon the Dominion Bank withdrew this part of their claim, and the Master disallowed it. Cayley never heard of this withdrawal by the Dominion Bank of their claim on the cheque till after the first dividend was declared and made payable, and only filed his claim against the Central Bank on the cheque on September 13th, 1888. The liquidators claimed the right to set off the amount of Donovan's notes.

Held, that they were not entitled to do so. The fact of the Central Bank having accepted the cheque, and credited the amount to the Dominion Bank, and charged the amount to Donovan, showed conclusively that at that time the Central Bank was not a creditor of Donovan's, nor did the clauses in the Winding Up Act, concerning fraudulent preferences, help the liquidators.

Beck, for Cayley.

Meredith, Q.C., for the liquidators.

ROBERTSON, J.] [Jan. 25.

Re CENTRAL BANK (HENDERSON'S CASE).

Banks and banking—Winding up—Contributories—R.S.C. 120, *ss.* 45, 77.

The appellant, having been placed on the list of contributories in the winding up of the

Central Bank, appealed upon the ground that the transfer of the shares in question to him was a fraudulent transaction, perpetrated in the face of sec. 45 of the Banking Act, inasmuch as the Bank was trafficking in its own shares for the purpose of keeping up the appearance of bonâ fide sales, and so enhancing the price at which the shares of the Bank were being quoted in the market; and that the Bank took the appellant's notes for the price of the shares, undertaking that the notes should not be enforced, but, on a re-sale of the shares, should be delivered up to be cancelled; and that the said transactions were *ultra vires* of the Bank.

Held, that all this amounted to no defence against the liquidators, who represented the creditors of the Bank, and not the Bank alone. What rights the appellant might have as against the directors of the Bank, or other shareholders, was a different matter.

As to certain other shares, in respect to which the appellant had been placed upon the list of contributories, he appealed upon the ground that he had acquired them within one month before the suspension of the Bank, referring to sec. 77 of the Banking Act; and, also, on the ground that those who had transferred their shares to him within the period of one month before the suspension should have also been placed on the list.

Held, that the appellant was rightly placed upon the list as to these shares, but that those also who had transferred their shares within the month should be likewise put upon it.

A. C. Galt, for the appellant.

W. R. Meredith, Q.C., *contra*.

FERGUSON, J.] [Feb. 2.

COURSOLLES *v.* FOOKES, *et al.*

Fraudulent mortgage—Set aside by execution creditors—Priority between execution creditor and subsisting second mortgage—Costs.

C., an execution creditor, brought an action to set aside two mortgages made by his execution debtor to F. and H. respectively, and succeeded as to the mortgage made to F. In an application to decide the priority between C. and the remaining mortgagee, H., in which it was claimed that C. was entitled to the benefit of his diligence, and that to the extent of the mortgage set aside he should have priority over H. It was

Held, that C. was not entitled to any such priority, but that he was entitled to the difference between his solicitor and client costs, and such costs as he should recover from the defendants as in the nature of salvage.

Shepley, for the motion.

S. H. Blake, Q.C., *contra*.

Practice.

MACMAHON, J.] [Feb. 5.

RICE *v.* FLETCHER.

Arrest—Foreigner in Ontario temporarily—About to return home—Intent to defraud—Order to hold to bail.

The plaintiff claimed $20,000 damages from the defendant, the cause of action being criminal conversation with the plaintiff's wife. The defendant lived in the United States, but was here for a temporary purpose when the plaintiff had him arrested under an order to hold to bail.

The plaintiff in his affidavit sworn to on the 30th January, on which the order was granted, stated that the defendant had arrived in Toronto that morning, and that he intended to leave for his own country that night with intent to defraud the plaintiff of the damages he had sustained. Upon a motion for the defendant's discharge,

Held, that in leaving Ontario, he was not doing so with the intent to defraud the plaintiff, and was therefore entitled to be discharged. *Ex. p. Gutierrez*, 11. Chy. D. 298, specially referred to.

Bigelow, for plaintiff.

Tilt, Q.C., for defendant.

STREET, J.] [Feb. 16.

LUCAS *v.* CRUICKSHANK.

Security for costs—Rule 1243—Identity of cause of action.

The plaintiff, as administrator of his late wife, brought this action under R.S.O. c. 135, to recover compensation for her having been killed by reason of alleged negligence of the defendants.

Previous to his obtaining letters of administration to his wife's estate, he had brought an action in his own name against the same defendants for the same purpose, but discontinued it. The costs of the first action being unpaid, the defendants applied for security for costs under Rule 1243.

Held, that the cause of action in the two cases was not the same, and an order staying proceedings till the plaintiff should give security for costs was set aside.

W. H. Blake, for plaintiff.

Aylesworth, for defendant.

FERGUSON, J.] [Feb. 13.

MEIR *v.* WILSON.

Administrator ad litem—Rule 311.

It is not intended by Rule 311 that the business of the Surrogate Court should, in a large measure, be transferred to the High Court; the intention was to provide for necessities arising in the progress of an action, where representation of an estate is required in the action, and there has not been carelessness or negligence on the part of the party who may require the appointment made.

Under the circumstances of this case an application for the appointment of an administrator *ad litem* was refused.

Re Chambliss, 12 P.R. 649, distinguished.

A. H. Marsh, for the motion.

Hoyles, contra.

FALCONBRIDGE, J.] [Feb. 20.

In re MCGREGOR *v.* NORTON.

Prohibition—Division Court—Money paid into Court by defendant—Plaintiff's intention to proceed—Failure to notify in writing—R.S.O. c. 51, *ss.* 125, 126—*Attorning to jurisdiction.*

The defendant in a Division Court suit paid $5 into Court as a full satisfaction for the plaintiff's demand, under R.S.O. c. 51, s. 125. The plaintiff notified the Clerk of the Court, but not in writing, as required by s. 126, that he intended to proceed for the remainder of his claim. The defendant was not notified of this, and did not attend the trial. Judgment was given for the plaintiff, and the defendant moved for, and was granted, a new trial on terms.

Held, that the defendant had attorned to the jurisdiction of the Division Court by moving for a new trial; and that prohibition should not be granted, as the Division Court could, on the new trial, adjudicate upon the objection of the defendant to the plaintiff's failure to notify in writing.

Kappele, for plaintiff.

W. M. Douglas, for defendant.

FALCONBRIDGE, J.] [Feb. 20.

CANADA COTTON CO. *v.* PARMALEE.

Attachment of debts — Unadjusted insurance moneys—Appeal by garnishees.

Insurance moneys alleged to be due to a judgment debtor for a loss where the claim has not been adjusted, acknowledged or admitted, are not attachable under Rule 935 or otherwise.

The garnishee has the right to appeal against an order directing the trial of an issue between the judgment creditors and a claimant of the moneys attached.

Aylesworth, for the garnishees.

D. W. Saunders, for the plaintiffs.

MACMACHON, J] [Feb. 23.

ROBINSON *v.* ROBINSON.

Solicitor and agent—Service of notice—Costs.

A notice of taxation of costs was served on a firm of solicitors in the town where the taxation was to be held as agents of the defendant's solicitors, who lived elsewhere. The solicitors served were not the booked agents of the defendant's solicitors, but had on several occasions acted as their agents in this very suit. The notice did not come to the knowledge of the defendant's solicitors until the day of the taxation.

Held, that the service of the notice was bad; and the taxation pursuant to it was set aside.

No costs were given against the plaintiff, because on the return of the notice the solicitors served as agents appeared, though without instructions, and obtained an enlargement, and this misled the plaintiff.

Rules 202, 203, 204, 461; *Smith* v. *Rowe*, 1 U.C. L.J.,N.S. 155; *Hayes* v. *Shier*, 6 P.R. 42; *Omnium Securities Co.* v. *Ellis*, 2 C.L.T., 216, referred to.

W. H. Blake, for defendant.

J. M. Clark, for plaintiff.

Appointments to Office.

CORONERS.

City of Toronto.

L. Pickering, M.D., of Toronto, to be an Associate Coroner for the City of Toronto.

DIVISION COURT CLERKS.

Stormont, Dundas and Glengarry.

Geo. Hearden, of Alexandria, to be Clerk of the Twelfth Division Court of the United Counties of Stormont, Dundas and Glengarry, *vice* Jas. R. Mackenzie, resigned.

Norfolk.

C. E. Freeman, of Simcoe, to be Clerk of the First Division Court of the County of Norfolk, *vice* W. R. Griffin, deceased.

Algoma.

W. L. Nichols, of Thessalon, to be Clerk of the Third Division Court of the District of Algoma.

BAILIFFS.

Wm. Miller, of Thessalon, to be Bailiff of the Third Division Court of the District of Algoma.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk as the case may be), on conforming with clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher, and pay $1 fee ; and on or before the day of presentation or examination file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

5. The Law Society Terms are as follows :—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, the affidavit attached to articles must state date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after admission on the books of the society as student or articled clerk.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term. Candidates for Certificates of Fitness are not required to give such notice.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

24. All notices may be extended once, if request is received prior to day of examination.

25. Printed questions put to Candidates at previous examinations are not issued.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, for 1889 and 1890.

Students-at-Law.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (1-33.)

1890. { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1889—Lamartine, Christophe Colomb.
1890—Souvestre, Un Philosophe sous le toits.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.
Arithmetic.
Euclid, Bb. 1., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 123 Revised Statutes of Ontario, 1887, and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act; R.S.O. 1887, cap. 44, the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110, 143.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 pér cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers: Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Michaelmas Term, 1888.

The Canada Law Journal.

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THE now somewhat celebrated contempt of court case arising in *Reg. ex rel. Felitz* v. *Howland*, has at last reached a conclusion; the Supreme Court having recently decided by unanimous voice in favor of the appeal of the editor of this journal from the judgment of Mr. Justice Proudfoot, affirmed by the Court of Appeal. As the matter is one of great importance to both the public and the profession, we shall refer to it at length when the judgments of the Supreme Court judges are received.

WE are glad to see that the Government has, after too long a delay and as the result of continued appeals from the Bar and the Press, both legal and lay, brought in a measure to increase the salaries of the judges of the Superior Courts in the various Provinces of the Dominion. The scheme, when finally settled, will be published by us in full. We shall also be compelled to comment on the main reason why this measure of justice was not accorded long ago. It is the same old story of favor to Quebec at the expense of Ontario, as is very evident on an examination of the facts of the case.

WHILST we are pleased to see our judges of the Superior Courts in Ontario receiving an increase of salary, we think something substantial should have been done for the judges of our County Courts, especially as their duties are much more onerous than those of most of the twenty-nine puisne judges of the so-called Superior Court of the Province of Quebec, whose salaries are from $4,500 to $6,000 per annum. In connection with this subject we hope the Ontario Government will recognize the propriety and justice of following the example of the Dominion Government, and increase to a proper amount the present miserably low salaries paid to the Master in Ordinary and Master in Chambers. Both have the work of judges, and they have no interval of rest from continuous and daily judicial labors. It is only reasonable that their salaries should be at least $5,000 each.

THE CONSTITUTIONALITY OF THE QUEBEC JESUIT ACT.

WE propose to continue the discussion on this Quebec Act within the same passionless lines of legal argument and judicial reason as in our former article. The law has no passion or sentiment, and is of no church or political party, but is supreme over all. Only by the light of its words and reason can we be guided to the constitutional rules which control this Act, or learn what is the final judgment and will of the law as to its legislative validity.

In addition to the levy of taxes (Hawkins Pleas of the Crown, p. 50), the Pope in early days asserted a civil jurisdiction as an appellate sovereign over the English government. To prevent this, various statutes were passed. The 16 Richard II, c. 5 (still in force), after reciting that "cognisance of cases belongeth only to the King's Court, in the old right of his Crown," but that divers processes hath been made by the Bishop of Rome, whereby the regality of the Crown was submitted to the Pope, thereupon prohibited all persons from pursuing in the Court of Rome, or elsewhere, any processes, or instruments, or other things whatever, which touch the King, or his realm, or which do sue in any other than the King's Courts, "in derogation of the regality of our lord the King."

Another statute (still in force) recites the vigorous protest of Parliament that "the Crown of England which hath been so free at all times, that it hath been in no earthly subjection, but immediately subject to God and none other, in all things touching the regality of the same Crown, should be submitted to the Pope, and the laws and statutes of the realm defeated by him, and avoided at his will, in perpetual destruction of the sovereignty of our lord the King, his Crown, his regality and all his realm."

The statute, 25 Henry VIII, c. 21, has also an important bearing on this Quebec Act, for it expressly prohibits the Sovereign from procuring licenses, delegations, etc., or *any instrument in writing*, from the Bishop of Rome, "called the Pope"; and being binding on the Sovereign, is also binding on her representatives and ministers.

These statutes, says Lord Coke, are declaratory of the ancient or common law of the realm (4 Coke's Inst. 340), and they declare that every encouragement or acknowledgment of the Papal, or a foreign, power, within the realm, is a diminution of the regal authority of the Crown, and is an offence (4 Bl. Com. 110). By the several statutes, 24 Henry VIII, c. 12, and 25 Henry VIII, c. 19 and 21, to appeal to Rome from any of the King's Courts, which (though illegal before), had been connived at; to sue to Rome for any license or dispensation, or to obey any process from thence, were made liable to *præmunire* (*Ibid. 115*). Though the penalties of *præmunire* are now obselete, a wilful contravention of any Act which is not otherwise an offence, may be a misdemeanor.

In dealing with this question of *ultra vires*, it must be borne in mind that "the Government of the Province," mentioned in the Act, is constitutionally Her Majesty the Queen, as representing the corporate and supreme sovereignty of the Empire, for by the B.N.A. Act, the executive government and authority of

and over Canada, is declared "to continue and be vested in the Queen," (s. 9). The agreement with the Jesuit Fathers is, therefore, an agreement with the Crown. And this Quebec Act, if not *ultra vires*, is "an Act which is assented to on the part of the Crown, and to which the Crown therefore is a party;" per Lord Chancellor Cairns in *Theberge* v. *Landry*, 2 App. Cas. 108.

The preamble recites without disapproval the claim made by the Pope, that "the Holy Father reserved to himself *the right of settling the question of the Jesuits' estates in Canada.*" This claim by the Pope is the assertion by a foreign potentate, of a right to a temporal sovereignty or jurisdiction over the territorial possessions of the Crown in Canada (for all admit that the Jesuits' estates are Crown property), and seems to have been conceded, for thereupon the Pope gave the following consent, which by being recited in the Act, has obtained executive and legislative sanction in that Province: "The Pope *allows the Government to retain the proceeds* of the sale of the Jesuit estates as a special deposit *to be disposed of hereafter with the sanction of the Holy See.*" Substantially similar claims by former Popes of temporal jurisdiction in England in early days, led to vigorous parliamentary protests and the enactment of the stringent prohibitory Acts to which we have referred.

The preamble then recites a proposition to the Jesuit Fathers for a perpetual concession to the Crown of all property, title and rights in the Jesuit estates, "in the name of the Pope, of the Sacred College of the Propaganda, and the Roman Catholic Church in general," which was accepted with the following conditions as to its being a binding agreement after ratification by the Pope:

"(7.) Any agreement made between the Government of this Province and the Jesuit Fathers will be *binding only in so far as it shall have been ratified by the Pope*, and the legislature of this Province.

"(8.) The amount of the compensation fixed shall remain in the possession of the Government of the Province as a special deposit *until the Pope has ratified the said settlement*, and made known *his wishes respecting the distribution of such amount in this country.*

"Our Corporation will receive the interest upon such deposit at four per cent. from the date of the signification to the Provincial Secretary of the *acte* of the Pope confirming the said arrangement, up to the payment of the capital which is to be made to the persons entitled thereto within six months after the signification to the said Provincial Secretary of *the decision of the Pope respecting such distribution.*"

These provisions, importing the foreign jurisdiction of the Pope into matters affecting civil government in Quebec, are affirmed by the first and second clauses of the Act.

The power thus given to the Pope to ratify the agreement with the Crown implies also the power to negative or veto it.

Considering then these conditions in the light thrown upon them by the extracts we have given from both statute and common law, they obviously suggest the questions: (1) Is it within the constitutional or regal power of the Crown to submit any agreement, respecting its territorial possessions, or respecting any

matter of internal or civil government, to the ratification or veto of a foreign power? And (2), can the Crown constitutionally assent to such foreign power dispensing and distributing a grant of public money, and adjudging who of its subjects are to share and the quantum of their share in the public moneys of which it is the sovereign trustee? And in fairly considering these questions, the name of any other foreign power may be substituted for that of the Pope.

We think both questions must be answered in the negative. The law does not permit the Crown, its ministers, or subjects, or any colonial legislature, to grant or delegate any such authority to any foreign power. To submit any matter of executive government, or any question between the Crown and its subjects to a foreign or alien power, involves an abdication by the Crown of its regal sovereignty as the supreme executive and head of the nation. Such a submission to a foreign power concedes to that power the right to veto as well as to ratify the act of the Crown affecting its own subjects, and is therefore inconsistent with, and destructive of, the ordinary prerogatives of an independent sovereignty.

By the express words of this agreement and Act, there is an attempt to vest in an alien (potentate or cleric, it matters not) a power (1), to ratify or veto an agreement with the Crown; (2), to determine the persons entitled to, and the quantum of their shares in, the $400,000 voted by the Act. The legal vitality and operation of the agreement and of the statute are thus made to depend upon "the *acte* of the Pope." If the Pope vetoe the agreement, the Act becomes null and void. If he neglects or refuses to accept the delegation of power to distribute the $400,000, the Act becomes inoperative. These regal or executive powers granted to a foreign potentate concede to and vest in an alien by his title of sovereignty a right of control and veto in the supreme affairs of a sovereign government, when in the lesser affairs of the political franchise, no rights of voice or vote are allowed to aliens by our own or any other civilized nation.

The ratification or veto of the Pope, and his decision respecting the distribution of public money in Quebec, are to be signified by the written *actes* of the Pope, which when deposited in one of the Public Departments of the Crown in Quebec, will be "instruments in writing from the Bishop of Rome, called the Pope," forbidden by the statute of Henry; and, if carried out, will be the written evidence of a foreign potentate's exercise of executive and temporal jurisdiction over the territorial possessions and moneys of the Crown in this part of the dominions of the Empire. No one will contend that the Pope could lawfully exercise such executive or temporal jurisdiction in England, and if not there, neither can he lawfully exercise it in any of the Provinces of Canada.

Even the short-lived statute 1 & 2 Phil. and Mary, c. 8, which re-established the spiritual supremacy of the Pope in England, may be cited as hostile to the validity of this Quebec Act, for it confirmed the confiscations of monasteries, etc., by prior sovereigns, and provided that the titles of all lands in the realm should be tried and judged in the Queen's Courts and not elsewhere, and declared that nothing in the Act should derogate, diminish, or take away, any prerogatives, pre-eminences, authorities or jurisdictions of the Imperial Crown of the realm.

We have cited in these articles Imperial statutes which provide that their

enactments shall apply to all subjects of the realm and of the other dominions of the Crown ; and by these latter words they are Imperial laws in force in the colonies and can only be varied or repealed by Imperial legislation. It is also a well established rule that the common law of England is the common law of the colonies, and that the Imperial statutes in affirmance of it passsed antecedent to the acquisition of a colony, are in force there (Chalmers' Colonial Opinions, p. 511). So are all Imperial statutes which are manifestly of universal policy (Clark's Colonial Law, p. 15). And the Courts in Lower Canada (now Quebec) have held that as soon as Canada ceased to belong to France, the law of Canada ceased to exist, and the public law of England came in (*Corse* v. *Corse*, 4 L.C. Jur. 314). The Imperial laws we have cited were part of the public law of England at the time of the cession of Canada to the British Crown, and are still in force. The B.N.A. Act, s. 129, exempts Imperial statutes from any right of repeal by the legislative powers of the Dominion or Provinces ; and by the 7 & 8 William III, c, 22, now superseded by 28 & 29 Vict., c. 63, all colonial laws repugnant to the Imperial statutes in force in the colony are void and inoperative to the extent of such repugnancy.

But the Imperial Act known as the Quebec Act of 1774, seems to be conclusive on this question. By s. 5 of that Act His Majesty's subjects in the province were allowed "the free exercise of the religion of the Church of Rome," subject to the provisions of the Act of Supremacy, 1st Elizabeth c. 1. The Act of Elizabeth thus made part of the law of Canada, revived the statutes of Henry prohibiting the foreign jurisdiction of the Pope, and added a general prohibition that "no foreign prince, person, prelate, state, or potentate, spiritual or temporal," should use, enjoy, or exercise any manner of power, jurisdiction, or authority, within the realm or any of the dominions of the Crown. This Imperial Act is still part of the law of the Province of Quebec.

We think we have now shown our readers sufficient of both common and statute law to enable them to judge how far this Quebec Act is, according to Blackstone, the introduction of a foreign power into this land, the creation of an *imperium in imperio*, and a diminution of the regal authority which constitutionally belongs to the Crown, and therefore *ultra vires* of the legislature of Quebec.

THE GRAND JURY SYSTEM.

ATTENTION has been called to the subject of Grand Juries by Senator Gowan in a most interesting and instructive speech, delivered last month in his place in the Senate. We wish that our space permitted us to reproduce all the remarks of the honorable gentleman. No one in Parliament is better able, and few as competent, to discuss this subject in an intelligent manner from an experimental point of view. Having had nearly forty-one years of continuous judicial service he has had large opportunities of forming an opinion as to whether or not it is desirable to make a change in the Grand Jury system as it at present exists in this Province. As he stated in his address, he has come to the definite conclu-

sion that the Grand Jury has survived its usefulness, and that some system similar to that of the Scotch Public Prosecutor might well take its place.

In 1855, a series of articles appeared in this journal, advocating the passage of a measure which eventually took the form of the County Crown Attorney's Act, which was passed in 1857. This, as Mr. Gowan remarks, was one of the most valuable of the many statutes affecting reform in law procedure which Sir John A. Macdonald has placed on the statute book. All that was said then applies now to the several Provinces where the office of local Crown prosecutor does not exist, and we have no doubt that representatives from those Provinces obtained information from the honorable Senator's speech which will be of infinite value to them.

The learned Senator brought out very strongly various objections to the present Grand Jury system. We shall now refer shortly to the most important.

Mr. Gowan claims, as the fact is, that one of the worst features of the system is its secret and practically irresponsible character, every member of the body being sworn to secrecy before he can act. Open administration of justice, the best guarantee of civil liberty, is wanting; and publicity, the very essence of confidence in judicial proceedings, is guarded against. Individually, the members of the Grand Jury are practically irresponsible, and are often made to serve as a block to proper prosecution and to screen an offender who has been sent up for trial by a magistrate after an open inquiry. It is true that the Crown Counsel has access to the Grand Jury, but here again crops up the difficulty of the body being a secret one; he has necessarily large influence with the Grand Jury, and frequently controls their actions, whilst, at the same time, he personally is not responsible, nor is he amenable to public opinion.

Then again, the Grand Jury is a changing body. Those composing it are not men of judicial experience, or accustomed to the examination of witnesses or the investigation of facts. It is quite possible for an unwilling or partial witness appearing before a number of laymen to suppress facts, and to color statements so as to avert a trial, or to connive with the accused or his friends, and thus to cause injustice to be done.

Another objection arises in this way. In criminal trials before the Petit Jury there is a right of challenge; with the Grand Jury there is none. This objection is thus stated by the learned Senator:

"Another weighty objection to the Grand Jury is this: there is no challenge, such as there is to the Petit Jury. Persons related to, or closely connected with, the prosecutor or the accused, may be on the Grand Jury—personally or politically connected, as friend or antagonist—or persons who have a strong personal or pecuniary interest in the matter to be dealt with, or men who hold and have expressed strong opinions on the case. Such persons, every one will say, ought not to be on the Grand Jury in the particular case. But how is it effectually to be guarded against? The safeguard of full right to challenge wanting—nor is it a sufficient answer to say the verdict of a Petit Jury must be unanimous. The finding of a Grand Jury is by the majority, but who can calculate upon the

influence that may be exerted in a secret tribunal by one or two of its members, moved by prejudice or influenced by unworthy and evil motives?—nor is such a thing improbable of occurrence. To my mind this is a grave objection."

The possibility of mistakes without corrupt motive, though not an inherent evil in the system, is a very frequent occurrence, much more so than would be the case if the investigation were in the hands of a trained legal mind. A number of incidents were mentioned under this head which we have not space to refer to.

The question of expense is also material. It is stated that the cost of Grand Juries is from $40,000 to $50,000 yearly in Ontario, a considerable sum which, we think, might be better spent, though of small moment if there were any real advantage to be gained by the system. In connection with this, the point was made, that if the Grand Jury were abolished it would leave more material from which to select the Petit Jury, the more important body of the two, being the one which finally decides upon the guilt or innocence of the accused.

The advocates of the Grand Jury system bring forward as one of the most important of its advantages the allegation that it is an educator of the people, and that those who serve as Grand Jurymen "gain a certain knowledge of law and a right conception of its salutary influence, which they become agents in diffusing in their neighborhood, and thus inspire the public with more respect for the law and its administration." The answer of the learned Senator to this is well put in the following words: "Perhaps so, and a man in a lifetime may have two or three opportunities for gaining such knowledge; but it must be homeopathic in amount, and it seems to me that the intelligent reader of one of uor great dailies, which rarely fail to give full and intelligent reports of important cases, would gain much more information at his own fireside."

Others again who favor the present system do so as they regard it as a great "bulwark of our liberties." It is undoubtedly ancient, and was at one time more or less a representative democratic institution, and it has undoubtedly in years gone by stood between the rights of the people and the arbitrary and tyrannical power of the kings and governments; but as to this the thought of the speaker was, that if this arbitrary power were "ever to raise its hand in the courts or elsewhere, the people of this country would not, I am very sure, fight behind the feeble barricade of a Grand Jury."

The judges of Ontario have been divided in their opinions as to the desirability of retaining the Grand Juries. One scarcely likes to advance an opinion contrary to that held by such a one as the late Chief Justice Draper. Chief Justice Cameron also held the opinion that the Grand Jury should be retained, and others thought in the same way. Chief Justice Hagarty thought that that old-fashioned institution of the Grand Jury could not be dispensed with until some very careful substitute was found, which the then law did not present. Chief Justice Harrison, however, on the other hand, declared in favor of their abolition. So also Mr. Justice Gwynne, who thus expressed himself at an Assize in the City of Kingston. We have pleasure in reproducing his remarks as follows:

"Such, however, is our law, that at the busiest portions of the year you are

called from your avocations and private pursuits to render to the country the invaluable service of determining whether the magistrates who have already investigated the cases have or have not grossly perverted their duty, and whether there is, in fact, any sufficient justification for the detention of persons whom they have committed, and for subjecting them to trial for the offence charged. I do not pretend to suggest that the intervention of Grand Juries should not still be maintained in state offences, as a protection to the subject against the tyranny of the Government, if the days for Government acting the *role* of tyrants are not passed away; but to call for their intervention in those cases of crimes against society at large, which are the ordinary subjects for the consideration of Grand Juries, is, to my mind, an absurdity which can only be accounted for by that veneration for antiquity which seems to overshahow in some things the human mind * * * Well, gentlemen, the law calls upon you, twelve at least concurring, to investigate these cases, which have already been so investigated that, as a result, five out of the eight accused are confined in gaol in the custody of the sheriff, and I trust you will find, as indeed I doubt not you will, that the committing magistrates have not been so arbitrary and unjust as to commit the parties without some *prima facie* evidence justifying the putting them on their trial—that, in fact, you will find that their labors have not been in vain, and perhaps you may be induced to enquire whether the service you are called upon to render the public is of that value as to present an equivalent for the inconvenience to which, in your capacity of grand jurors, you are put."

On the other side of the question many of the supporters of the present system say that there would be little difficulty in coming at once to the same conclusion were it not for the difficulty of finding a desirable substitute which could be safely looked to as not only free from the objections so forcibly put by these eminent men, but also which would not be likely to produce as great evils in other directions; in other words, if men could be found in every locality suitable in respect of legal attainments, of good reputation, free from political bias or influence, and who would take a judicial view of the case presented, there would be an end of the argument. The difficulty lies to a great extent, that appointments are made from a purely political standpoint. Some are undoubtedly good, some have reflected no credit on the appointing power.

The motion of the Hon. Mr. Gowan was to call attention to the actual working of the Grand Jury system in connection with criminal procedure, and to the value and importance of the Ontario County Crown Attorney system in the same connection; and the question asked the Government was whether they had under consideration the propriety of submitting a measure to Parliament for the abolition of Grand Juries and the substituting for them some general system of public prosecutors similar to that which exists in Scotland, or the desirability of extending the benefit of the County Crown Attorney system in connection with criminal procedure to all the Provinces in the Dominion. The leader of the Senate, the Hon. Mr. Abbott, in answering the question, stated that the attention of the Government had been directed to this question for a long time past, and

that it was under very serions consideration. He only made the promise, however, that as soon as the tendency of public opinion was such as to justify an attempt to make a change, the Government would be prepared with a measure to substitute for it some system of a more satisfactory, speedy and economical character. It cannot be said that there was anything very definite in this promise. We trust that the Government will take some active steps to ascertain the view of those most competent to express them as to whether or not the change should be made. The views should be ascertained not only of the Superior Court Judges, but also of those of the County Court, as well as of prominent professional men in different localities; and the inquiry should be gone into with an earnest desire to arrive at the true views of the Bench and Bar on the subject.

SOLICITOR AND CLIENT.

(*Continued from p. 105.*)

IN *Bellew* v. *Russel*, 1 B. & B. 96, the grant of a leasehold made by a deceased client to his solicitor, was impeached by the former's representatives. The lease in question was made by the client to the solicitor while the relation subsisted, in consideration of a bond for £1,000, which was subsequently released, the solicitor re-demising the property to the client, for the lives of himself and his wife, at a nominal rent. The solicitor was a relative for whom the client entertained great affection, the latter being on bad terms with the rest of his relations, who had harrassed him with law suits. The client survived the granting of the lease for seven years and acquiesced in it. Lord Chancellor Manners upheld the gift, but in doing so he said: "If the transaction had been between persons connected only as attorney and client, and impeached in the lifetime of McDermot (*the client*), it could not have stood, nor will I say that relief would have been denied his representative, but looking at the real situation and the conduct of McDermot from 1789 to 1796 respecting this transaction, I do not think I impugn any principle or disturb any decision by refusing the plaintiff relief against this deed." In short, he treated the matter as being a mere preference by the client of one relative whom he liked, to others who had disobliged him. In both of these last two cases it will be noticed that the solicitor was related to his client, and this fact was doubtless the primary inducement to the making of the gifts. But so strict is the general rule which precludes a solicitor from taking a gift from his client, that where the relationship of solicitor and client exists, it is held to be sufficient to rebut the presumption of a gift being an advancement from a parent to a child which might otherwise arise. Thus in *Garrett* v. *Wilkinson*, 2 D.G. & Sm. 244, the facts were that a mother and aunt of a deceased solicitor had placed two sums of money in his hands to invest, and with their consent he invested the whole of the money upon the security of a bond in which he was named as sole obligee. This bond he handed over to his mother and aunt, with a memorandum

stating that he held the money, the interest on which he agreed to pay them during their respective lives. There was some evidence that the money was invested in this way for the purpose of making a gift of the money to the solicitor after the death of the mother and aunt, in order to save probate and legacy duty, but this was denied. Knight Bruce, V.C., held that although the general rule is that when an investment is made by a parent in the name of the child, it is *prima facie* evidence of an advancement, and the burthen of proof is on the party denying the gift, yet as the son was in this case solicitor for his mother, the fact of that relationship neutralized, or prevented the application of, that rule in the present case.

While the law precludes the solicitor from accepting gifts from his client, *inter vivos*, it is equally jealous in protecting the client's representatives, after his death, from being prejudiced by testamentary dispositions in favor of a solicitor by whom the will is drawn, for where a solicitor draws a will under which he takes a benefit, the Court will not presume that the testator knew its contents, but the solicitor must be prepared to establish by evidence that the testator did so, but it is not absolutely necessary that the evidence should be direct, provided there is sufficient circumstantial evidence ; *Raworth* v. *Marriott*, 1. My. & K. 643. The fact that a solicitor is himself a residuary devisee in a will prepared by himself for a client, seems to have been considered by Buller, J., to be almost decisive evidence of fraud, but Lord Eldon, while admitting the circumstance to be one calling for a considerable degree of jealousy on the part of the Court, nevertheless, in the absence of any other evidence of fraud, refused to set aside the will ; *Paine* v. *Hall*, 18 Ves. 475. In *Hindson* v. *Weatherill*, 5 D.G.M. & G. 300, a solicitor to whom his client had given a note for £1,000, prepared the client's will, whereby the gift was confirmed, and a devise of land was also made to the solicitor ; Stuart, V.C., made a decree declaring the solicitor to be a trustee of these gifts for the next of kin and heir at law of the testator ; 1 Sm. & G. 604 ; but on appeal, Knight Bruce & Turner, L.L.J., though much pressed with the case of *Seagrave* v. *Kirwan*, hereafter referred to, reversed this decree, there being evidence that the testator knew and approved of the contents of the will. In the later case of *Walker* v. *Smith*, 29 Beav. 394, Sir John Romilly, M.R., referring to the case of *Hindson* v. *Weatherill*, said that in his opinion gifts of legacies do not stand on a different principle from gifts *inter vivos ;* but he considered that case well decided on the ground that any suspicion of undue influence by the solicitor was sufficiently removed by the deliberate statement proved to have been made by the testator to a third person, an independent and disinterested witness, showing that he knew and approved of the contents of the will ; and in the case before him he upheld legacies of £500 each to the solicitor, his wife, son, and daughter, on the production of the testatrix' instruction for her will in her own handwriting, and in the absence of any evidence showing that the solicitor had exercised any uudue influence over the testatrix ; but in the same case he set aside a gift of £500 of stock made by the client to the solicitor during her lifetime. But he says : " Undoubtedly if she had called in a third person who had

no interest in the matter, and said, 'I have deliberately given this £500 to Mr. Smith for the benefit of himself and his children, or for his own benefit exclusively,' then I should have upheld the gift." This is a mere *obiter dictum*, and it seems in view of the case of *Tyars* v. *Alsop*, *supra* p. 100, to be questionable law. But in a later part of his judgment he makes this pertinent observation: "It is to be obesrved that the strict burthen of proof lies on the recipient of the bounty. He must prove every point of the case, not only the transfer, but that the transfer was meant to be made to him beneficially"; and see *In re Holmes*, *Woodward* v. *Humpage*, 3 Giff. 337.

In *Seagrave* v. *Kirwan*, Beatt. 157, Sir Anthony Hart, when Lord Chancellor of Ireland, laid down that when a solicitor prepares a will or a deed for a client, the law imputes to him a knowledge of all the legal consequences to result, and requires that he should distinctly and clearly point out to his client all those consequences from whence a benefit may arise to himself from the instrument so prepared, and if he fail to do so, equity will deprive him of it; and he held that a solicitor who had prepared a will wherein he was named as executor, and omitted to advise his client, that he would, as executor, become beneficially entitled to the undisposed of personalty, was trustee thereof for the next of the kin,—and this principle may be considered to be established by the highest authority in *Bulkley* v. *Wilford*, 2 Cl. & F. 102, where, upon a contract for sale of *part* of an estate, the purchaser requiring a fine to be levied, the vendor employed an attorney, who was his heir presumptive, to levy the fine, and the attorney advised the levying of a fine upon the *whole* estate without telling the client the effect of it. The fine was levied and the vendor died without declaring its uses, and without republishing his will whereby he had devised the whole estate to his wife, in consequence of which the will was revoked. The attorney claimed the estate as heir, but it was held that he was trustee of it for the widow, and in the House of Lords it was held that the attorney's alleged ignorance of the effect of the levying of the fine, and his omission to inquire whether his client had made a will, were such professional ignorance and neglect as afforded a ground, independently of the ground of fraud, for holding him to be a trustee for a third person of any benefit resulting to himself from his professional ignorance or neglect, to the prejudice of that person; and see *Nanney* v. *Williams*, 22 Beav. 452. The same principle also prevents a solicitor from benefiting himself at his client's expense by any act done by the client by his advice. This may be illustrated by the case of *Bayley* v. *Wilkins*, 3 J. & L.T., 630, where a solicitor having advised his client, who was the heir and personal representative of a deceased debtor, to buy up an incumbrance on the estate for less than the sum due on it, without informing him that his purchase would accrue to the benefit of the solicitor, who was also an incumbrancer on the estate; and it was held that the heir was entitled to the full amount of the incumbrance as against the solicitor, Lord Chancellor Sugden saying: "The question is whether the plaintiff by his representations induced the defendant to become the purchaser of this prior incumbrance, and to believe that he was to have the benefit of it. If he did, he cannot insist that he himself is entitled to the benefit of the purchase."

Voidable gifts and transactions between solicitor and client may be subsequently ratified, but the ratification must take place under such circumstances as would constitute a valid gift if then made for the first time. A subsequent confirmation deed executed after the relationship had ceased, and when the client is acting under the advice of another solicitor, is undoubtedly sufficient to confirm a previous void gift: *De Montmorency* v. *Devereux*, 7 Cl. & F. 235; but where the confirmation deed is executed while the relation still subsists, it is useless; and where the transaction which it purports to confirm was fraudulent, it will be regarded as a mere continuation of the fraud: *Dunbar* v. *Tredennick*, 2 B. & B. 304. And a confirmation by will, will be equally useless, unless it can be shown that the testator knew that the transaction was voidable and had resolved, knowing its invalidity, to confirm it. Thus, where a sale was made by a client to his solicitor under circumstances which rendered it invalid, and the client by codicil devised the land to the solicitor in confirmation, it was nevertheless held to be invalid and the attempted confirmation of no effect: *Waters* v. *Thorn*, 22 Beav. 549. In that case Sir John Romilly, M.R., remarked: "To make the case of *Stump* v. *Gaby* (see *supra* p. 101) apply, it ought to appear that she (*the testatrix*) knew that case was one which could be successfully contested by her, and that, so knowing, she had resolved to give the property to Mr. Bowker (*the solicitor*), and to confirm the sale."

The jealousy with which the law regards all gifts made by clients to their solicitors extends to other transactions between them. A solicitor may sell property to, and may purchase property from, his client, but such transactions do not stand on the same footing as do those between parties between whom no such relationship exists. In one of the latest cases on the subject of purchases by a solicitor from his client, it is said the Court does not hold that an attorney is incapable of purchasing from his client; but watches such a transaction with jealousy, and throws on the attorney the onus of showing that the bargain is, generally speaking, as good as any that could have been obtained by due diligence from any other purchaser: and that the Court in dealing with such a case has to consider the circumstances of the employment and judge of the amount of influence exercised: *Pisani* v. *Attorney-General*, 5 P.C. 516. In that case the purchase was sustained, it appearing that the solicitor was not the general or confidential adviser of the client; but the Judicial Committee refused to award costs to the solicitor, though successful in the litigation, because he had not insisted on the employment of an independent solicitor.

In the older case of *Gibson* v. *Jeyes*, 6 Ves. 271, Lord Eldon says: "An attorney buying from his client can never support it unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for that vendor with a stranger; that must be the rule. If it appears that in that bargain he has got an advantage which, with due diligence, he would have prevented another person from getting, a contract under such circumstances shall not stand." So also in *Savery* v. *King*, 5 H.L.C. 655, Lord Cranworth says: "When a solicitor purchases or obtains a benefit from a client,

a Court of Equity expects him to be able to show that he has taken no advantage of his professional position, that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess, and that the solicitor has done as much to protect his client's interests as he would have done in the case of the client dealing with a stranger." The remarks of Kindersley, V.C., in *Tomson* v. *Judge*, 3 Drew. 306, which we have already cited, are to the same effect, and show that in the event of the transaction being impeached the onus of establishing its fairness lies upon the solicitor.

In *Holman* v. *Loynes*, 4 D.G., M. & G. 270, a solicitor was engaged by a client to sell property by auction. Part of the property was sold, and sixteen months after the completion of the sale, during which time there was no employment of the solicitor professionally, the solicitor bought from the client a portion of the unsold property. The consideration mentioned in the deed was stated to be paid, but it really consisted in part of a debt due by the client to the solicitor, and in part of an annuity agreed to be paid to the client, for an amount which the balance of the purchase money would obtain for a healthy life: but it turned out that the client was a person of intemperate habits; and it was possible that an annuity for a larger sum might, under the circumstances, have been obtainable, and the sale was therefore set aside. But when the transaction is perfectly fair at the time it takes place, and no concealment, misrepresentation, or undue influence has been exercised by the solicitor, the transaction cannot be impeached successfully; and the mere fact that the property has subsequently very largely increased in value affords no ground for invalidating the transaction: thus, in *Edwards* v. *Meyrick*, 2 Ha. 60, a solicitor had purchased an estate from his client, which increased considerably in value after the purchase, owing to a railroad, then contemplated, having been established in the neighborhood, by which means coal mines on the estate were made available; but it was held that this was a mere speculative advantage, the communication of which to his client the solicitor would not be bound to prove, the parties being in the same situation with reference to the means of forming an opinion upon it; and the sale was upheld, though part of the consideration was made up of costs due by the client; and so also, in *Kingsland* v. *Barnewall*, 4 Br. P.C.C. 154, leases for long terms of different parts of a client's estate made to his confidential adviser were upheld on its being shown that the purchase money was nearly equal to the value of the land, and that the lessee had been exceedingly serviceable to the lessor, who had died without impugning the transaction in any way: see also *Montesquieu* v. *Sandys*, 18 Ves. 301. The fact that one of the parties to a transaction is a solicitor, and the other has no legal advice except from that solicitor, it would seem is not of itself enough to invalidate a transaction between them: in *Edwards* v. *Williams*, 32 L.J. Chy. 763, a solicitor was applied to by a person with whom he had had no previous dealings to obtain an advance upon an annuity; he failed to procure the advance from any third party, and thereupon advanced the amount required himself and took a transfer of part of the annuity; he rendered a bill for his services, the amount of which was deducted from the money

advanced. The vendor had no independent advice. Eleven years afterwards the vendor attempted to impeach the transaction, but it appearing that the sum advanced was a fair price, and that no advantage had been taken of the vendor, the transaction was upheld. Knight Bruce, L.J., is reported to have said on appeal: "Nor would he view the case as strictly between solicitor and client. It happened, it was true, that one of the parties was a solicitor, and the other of them had no legal advice except from that solicitor; but there had existed no previous relation of solicitor and client between them, and therefore that confidence which was the basis of the rule of the Court in similar cases did not appear to have existed, and his lordship could not consider that this case came within that rule: "*Ib.* 765.

On the ground of public policy, it has been held that an attorney cannot validly purchase from his client a claim for damages after verdict, and before judgment, in an action which he is carrying on for his client, though his name does not appear as solicitor on the record: *Simpson* v. *Lamb*, 7 Ell. & Bl. 84; and see *Hall* v. *Hallett*, 1 Cox 34.

When a purchase by a solicitor from his client cannot be maintained as a purchase, either in consequence of inadequacy of price, or other want of fairness, the property will be ordered to stand as a security for what, on a proper account, may appear justly due from the client to the solicitor: *Wood* v. *Downes*, 18 Ves. 120.

While it is clear that a solicitor may purchase property from his client, provided he can show that the transaction was perfectly open and fair, it is equally clear that if he is employed by a client to sell, he cannot, without his client's full consent, himself become the purchaser. This proposition is established by the highest authority: *Austin* v. *Chambers*, 6 Cl. & F. 37, where a transaction of this kind was set aside after the lapse of two years: see also *Lees* v. *Nuttall*, 1 R..& M. 53; *Ex.p. James*, 8 Ves. 337: and he cannot evade this rule by taking the conveyance to a third party. "If, instead of openly purchasing, he purchases in the name of a trustee or agent without disclosing the fact, no such purchase as that can stand for a single moment. Such a transaction to stand must be open and fair and free from all objection," per Lord St. Leonards, L.C., *Lewis* v. *Hillman*, 3 H.L.C. 607.

What has been said in regard to purchases by a solicitor from his client applies equally to sales by solicitors to their clients. A solicitor is not prevented from selling to his client; but he must be prepared, if the transaction is attacked, to show that it was perfectly fair and just, and not induced by any misrepresentation or undue influence. As a solicitor may not buy from his client surreptitiously, so neither may he sell to him in that way. Thus, where a solicitor was jointly interested with others in certain property, which he advised his clients to buy, without disclosing his interest, it was held that he was trustee for his clients, of his share of the profits of the transaction: *Tyrell* v. *Bank of London*, 10 H.L.C. 26. But where solicitors sold to a company, whose formation they had promoted, certain property at a profit, and the transaction was perfectly fair and

above board, a bill by the liquidators of the company to compel them to account for the profits, was dismissed by Sir John Romilly, M.R.: *The Masons Hall Co.* v. *Nokes*, 22 L.T.N.S. 503.

A solicitor, besides being prevented from purchasing from his client surreptitiously, is also prevented from making use of his knowledge acquired in the service of his client, in order to purchase for his own benefit outstanding interests in property in litigation in which his client is concerned; and if, in violation of his duty, he attempt to do so, he will be held by the Courts to be a trustee for his client of the property so purchased, subject only to his lien for the price paid for it: *Wood* v. *Downes*, 18 Ves. 128; *Carter* v. *Palmer*, 8 Cl. & F. 657; and the same restriction also extends to the solicitor's clerk, as appears from the case of *Hobday* v. *Peters*, 28 Beav. 349, where a mortgagor consulted a solicitor in reference to the mortgage, and he turned her over to his clerk to assist her gratuitously; and the clerk, by reason of information derived during such employment, bought up the mortgage for less than half the amount due on it, and he was held by Sir John Romilly, M.R., to have bought as trustee for the mortgagor. But when the Court is not satisfied that the confidential relationship in fact existed at, or previous to, the time of the purchase, it cannot be disturbed: *Kilbourn* v. *Arnold*, 6 App. R. 158; and see *Edwards* v. *Williams*, *supra*.

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE *Law Reports* for January comprise 22 Q.B.D., pp. 1-128; 14 P.D., pp. 1-17; and 40 Chy. D., pp. 1-79.

CONSTRUCTION OF STATUTE—"CARRY ON BUSINESS."

Graham v. *Lewis*, 22 Q.B.D. 1, may be useful to note, as it involves the construction of a statute giving an inferior court jurisdiction over persons who carried on their business within the city of London. The defendant was a clerk employed by a solicitor at his office which was within the city of London, and it was held by the Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.) that the defendant did not "carry on business" there within the meaning of the statute. Lord Esher, M.R., puts the case in a nutshell when he says: "I think that those words mean to describe a person managing or conducting his own, and not somebody else's business. He must either manage or conduct a business of his own, or the business which is managed or conducted for him must be his own."

PRACTICE—WRIT SPECIALLY INDORSED——RULES ORD. 3, r. 6, ORD. 14 (C. R. 245, 739.)

Bickers v. *Speight*, 22 Q.B.D. 7, the writ of summons was indorsed with a claim by the plaintiff as asignee of an I. O. U. for money lent. An application having been made for him to sign final judgment under Ord. 14 (C. R. 739) and

refused, the case was appealed to the Divisional Court (Lord Coleridge, C.J. and Wills, J.), and a preliminary objection was taken that the indorsement was not a "special indorsement" within Ord. 3, r. 6, (C. R. 245.) This objection was overruled, the Court holding that the indorsement would have been sufficient under the C.L.P. Act, 1852, and was therefore good now. Lord Coleridge says: "If sufficient particulars are stated to bring to the mind of the defendant knowledge as to what the plaintiff's claim is, there is a good special indorsement," but this, of course, must be understood to be limited to those causes of action which under the rules, may form the subject of a "special indorsement."

PRACTICE—SOLICITOR AND CLIENT—ACTION ON UNTAXED BILL—LEAVE TO SIGN JUDGMENT UNDER ORD. 14 (C. R. 739)—FORM OF ORDER.

Smith v. *Edwardes*, 22 Q.B.D. 10, was an action by a solicitor to recover the amount of an untaxed bill. The plaintiff moved for leave to enter judgment under Ord. 14 (C. R. 739), and it was held that where the client admits the retainer and only disputes the propriety of the charges, an order to enter judgment may be made after appearance and before taxation, and a question being raised as to the proper form of order in such a case, the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) settled that it should direct a taxation of the bill pursuant to the statute, and that the plaintiff on the taxation should give credit for all sums received by him from or on account of the defendant, and that the plaintiff should be at liberty to sign judgment for the amount of the master's allocatur. The order which had been made giving the plaintiff liberty to sign judgment "for the amount indorsed on the writ, subject to taxation, and costs to be taxed," was therefore varied accordingly.

CRIMINAL LAW—HUSBAND AND WIFE—COMMUNICATION OF VENEREAL DISEASE TO WIFE—ASSAULT.

In *The Queen* v. *Clarence*, 22 Q.B.D. 23, which was a Crown case reserved, the prisoner was indicted for "unlawfully and maliciously inflicting grievous bodily harm" on his wife. The facts of the case were that the prisoner being at the time, to his own but not to his wife's knowledge, afflicted with a foul disease, had sexual intercourse with her, whereby he communicated the disease to her, which was the offence for which he was indicted and convicted. The Court (Lord Coleridge, C.J., Wills, A. L. Smith, Mathew, Stephen, Hawkins, Day, Manisty & Field, JJ., and Huddleston and Pollock, BB.) were of opinion that the conviction could not be supported. The Court was not, however, unanimous in its conclusion, as Hawkins, Day, and Field, JJ., dissented from the rest of the Court; and Lord Coleridge came with reluctance to the conclusion of the majority. The reasons for quashing the conviction appear to turn more on the supposed evil consequences which might flow from a contrary decision, by the possible extension to other cases of a like principle; but in the coming years, when the ladies have ascended the bench of justice, they will probably see the matter in a very different light, if indeed they do not sooner get the legislature to meet out punishment to husbands who have so little regard for their marital obligations.

CRIMINAL LAW—LIBEL—LETTERS PROPOSING IMMORAL INTERCOURSE.

In *The Queen* v. *Adams*, 22 Q.B.D. 66, another Crown case in which the interests of the fair sex were also involved, we are glad to see that the Court (Lord Coleridge, C.J., and Manisty, Hawkins, Day and A.L. Smith, JJ.) were able to come to a conclusion entirely satisfactory to the cause of morality. A young woman being desirous of getting a situation, advertised therefor in the *Daily Telegraph*, directing answers to be sent to a certain address. The prisoner in reply sent to this address a letter proposing that the advertiser, who was a virtuous and respectable woman, should enter into illicit intercourse with him; the letter was received by a relative of the advertiser, who, without showing it to the latter, handed it over to the police. The Court were unanimously of opinion that the letter constituted a defamatory libel calculated to provoke a breach of the peace, and affirmed the conviction.

LANDLORD AND TENANT—COVENANT BY LESSEE TO PAY RENT—ASSIGNMENT OF LEASE—SURRENDER OF PART OF PREMISES BY ASSIGNEE, EFFECT OF ON COVENANT OF LESSEE.

In *Baynton* v. *Morgan*, 22 Q.B.D., 74, the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) affirmed the decision of the Queen's Bench Division (21 Q.B.D., 101) noted *ante* vol. 24, p. 426. The plaintiff demised premises to the defendant for a term of years, and the defendant covenanted to pay the rent; the defendant assigned the term, and the assignee surrendered a part of the demised premises. The plaintiff brought his action against the original lessee on the covenant to recover the amount of the apportioned rent, for the part of the premises not surrendered. It was contended for the defendant that the legal effect of a surrender of part of the premises was to discharge the covenant of the lessee entirely, and also that the lessee became a surety for his assignee, and that by the surrender his rights were altered without his consent, and therefore he was discharged. But the Court of Appeal, without calling on counsel for the plaintiff, held the plaintiff was entitled to recover, the Court being of opinion that the contract was not one of suretyship, but a direct contract to pay the rent, and that no surrender of part of the demised premises could have the effect of putting an end to the term, and that therefore the covenant remained in force. The plaintiff submitted to an apportionment, but it is not very clear from the judgment of the Court that he would not have been entitled to recover the whole rent if he had claimed it.

PRACTICE—COSTS—JOINT DEFENDANTS IN ACTION OF TORT—DEFENDANT'S SEVERING IN HIS PLEADING—VERDICT AGAINST DEFENDANTS—COSTS OF SEPARATE PLEADING—TAXATION.

Stumm v. *Dixon*, 22 Q.B.D. 99, is a case upon a question arising on a taxation of costs. The action was one of tort against two defendants. They paid money into Court; the plaintiff denied its sufficiency, one of the defendants obtained leave to amend by severing in his defence and setting up other defences. At the trial the plaintiff succeeded against both defendants with costs. On the taxation the taxing officers taxed the costs occasioned by the defendant's severing in his defence against him only, and not against his co-defendant, and the Divisional

Court (Lord Coleridge C.J., and Manisty, J.) held that the taxing officer was right. It was admitted by the Court, however, that there was no authority on the point, which seems singular, as it is a state of facts which one would think cannot have been of very infrequent occurrence.

BILL OF EXCHANGE—FORGERY OF NAME OF PAYEE—PAYEE A FICTITIOUS PERSON—BANKER

Vagliano v. *The Bank of England*, 22 Q.B.D. 103, is a case which is calculated to make some stir in banking circles, inasmuch as it establishes a principle affecting the liability of banks in paying forged paper, which is calculated to cause very considerable hardship. The action was brought to obtain a declaration that the defendants were not entitled to charge against the defendant certain forged bills of exchange which they had paid under the following circumstances: One V. was a foreign correspondent of the plaintiff who was in the habit of drawing bills of exchange on the plaintiffs in favor of C.P. &. Co. A clerk of the plaintiffs forged bills in the name of V. in favor of C. P.& Co., and presented them in due course of business to the plaintiffs, and procured their acceptance; he then forged C.P. & Co's indorsement and got the amount of the bills paid over the counter by the defendants. This scheme was carried on until the fraudulent clerk had actually received $357,500, and the question in the action was whether the plaintiffs or the defendants were to lose this enormous sum. Charles, J., decided that the defendants must shoulder the loss. In the first place he holds that the payees being an existent firm, the acceptance in their favor could not be regarded as in favor of fictitious or non-existing persons, and therefore payable to bearer; and in the next place he held that the plaintiffs had not been guilty of such negligence as to be the proximate cause of the loss. It will thus be seen that it is not enough for a bank to be satisfied that a bill of exchange presented for payment bears the *bonâ fide* acceptance of its customer, but it must also assume the responsibility of seeing that the signature of the payee is genuine. An acceptor is, however, estopped from disputing the genuineness o the signature of the drawer; see *Phillips* v. *Im Thurn*, L.R. 1 C.P. 463.

SALVAGE—AGREEMENT TO ATTEMPT TO TOW—PAYMENT FOR WORK DONE.

Proceeding now to the cases in the Probate Division, the first requiring notice is *The Benlarig*, 14 P.D. 3. This was an action for salvage. It appeared that the master of the defendant's ship had requested the master of the plaintiffs' ship to tow his vessel to Gibraltar, which the latter agreed to do. After towing the vessel 130 miles the haw ers broke and the plaintiffs' vessel left her, and she was subsequently towed int Gibraltar by another vessel. At the time the plaintiffs vessel was employed, t e defendant's vessel, which with its cargo was worth £78,000, was in a disabled condition. It was held by Butt, J., that the plaintiffs were not entitled to a salvage reward, but were entitled to remuneration for the service rendered in fulfilment of their contract, which was fixed at £400.

NULLITY—MARRIAGE WITH A DECEASED WIFE'S SISTER.

Andrews v. *Ross*, 14 P.D. 15, brings into prominence the difference which now exists between the law of marriage in Canada and the mother country. In this

case the plaintiff, in 1876, went through the form of marriage with the husband of her deceased sister. The action was brought to have the marriage declared a nullity, and though at first expressing some reluctance to do so, Butt, J., came to the conclusion that notwithstanding the plaintiff had gone through a form of marriage which she knew to be void, she was nevertheless, according to the cases in the Ecclesiastical Courts, entitled to the decree she asked.

WILL—GIFT TO ATTESTING WITNESS—POWER TO SOLICITOR TO MAKE PROFESSIONAL CHARGES—WILLS ACT (1 VICT. C. 26) S. 15—(R.S.O. C. 109, S. 17.)

Proceeding now to the cases in the Chancery Division, *In re Pooley*, 40 Chy. D. 1, is the first calling for remark. In this case a testatrix appointed a solicitor one of the executors and trustees of her will, and declared that any trustee who should be a solicitor should be entitled to charge for all business done in relation to the estate as if he had been a solicitor employed by the trustees. The solicitor-trustee was one of the attesting witnesses, and Stirling, J., following the decision of Chitty, J., *In re Barber*, 31 Ch. D. 665, held that he was not entitled to any profit costs for business done by him for the estate, because this right could only arise under the will, and by the Wills Act, s. 15 (R.S.O. c. 109, s. 17), this benefit was invalidated as being a gift to a witness. This decision of Stirling, J., was affirmed by the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.)

COVENANT TO SETTLE AFTER ACQUIRED PROPERTY—DIVISIBLE COVENANT—LIFE POLICY—CONDITION IN POLICY AGAINST ASSIGNMENT.

In re Turcan, 40 Chy. D. 5, was an appeal from Sir H. Bristowe, V. C., of the County of Lancaster. By a marriage settlement the settlor covenanted to settle his estate and interest in any property of, or to which, he should become possessed, or entitled, during the marriage, by devise, bequest, purchase, or otherwise. He afterwards effected some policies of insurance on his life, one of which was subject to a condition "that it should not be assignable in any case whatever." The settlor was drowned and the policies were paid to his executors, but were now claimed from him by the trustees of the settlement. The Vice-Chancellor held the policies to be bound by the covenant and directed the money to be paid over to the trustees, and this decision was affirmed by the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) Some doubt was expressed by Cotton, L.J., as to whether the Court would specifically enforce a covenant to settle all a man's estate, but he held that this being an application to enforce the covenant only as against one class of property, that the covenant was divisible and might be enforced, and that the policies came within the definiton of property acquired "by purchase," and that although the condition against assignment contained in one of the policies prevented transferring the legal title to it, it did not prevent the insured transferring his beneficial interest.

WILL—CONSTRUCTION—"DIE WITHOUT LEAVING ISSUE."

In re Ball, Slattery v. *Ball*, 40 Chy. D. 11, is a case arising upon the construction of a will. The testator bequeathed personal estate in trust for Keith

Ball for life, and after his death, for Robert Ball and the heirs male of his body and in case Robert Ball died without leaving issue male, for John Ball. Robert Ball died in the lifetime of Keith Ball, having had only one son, who predeceased him without issue. North, J., held that the gift over to John Ball took effect, and the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.), affirmed him, holding that the cases where "leaving" had been construed as "having" in order to prevent a previous vested gift from being divested, did not apply where it was plain that the vested gift was in some event to be divested; a decision of Bacon, V.C., in *White* v. *Hight*, 12 Chy D. 751, to the contrary, was over-ruled.

TRUSTEE ACT, 1852—(15 & 16 VICT. C. 55) S. 2—WILFUL REFUSAL OR NEGLECT OF TRUSTEE TO CONVEY.

The short point decided by North, J., *In re Mills*, 40 Chy. D. 14, is simply this, that a refusal by a trustee to convey is not wilful within the meaning of the *Trustee Act*, 1852 s. 2, if the title of the person asking for the conveyance is disputed and the trustee entertains a *bona fide* doubt as to it, and an application by the *cestui que trust* for a vesting order was refused. The Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) affirmed the decision.

ANCIENT LIGHT—PRESCRIPTION—USER—STATUTE OF LIMITATIONS—(2 & 3 W 4, C. 71), SS. 3. 4—(R.S.O. C. 111, S. 35.)

Cooper v. *Straker*, 40 Chy. D. 21, has now less interest for lawyers in Ontario, since the passing of 43 Vict., c. 14, s, 1 (now R.S.O. c. 111, s. 36), than it would have had before the passing of that Act, which virtually abolishes the acquisition by prescription of rights to the access of light, but inasmuch as it saves such rights acquired by twenty years' user before 5th March, 1880, it is still as regards the latter an authority. In this case, Kay, J., holds that the owner of a building having windows with movable shutters which were opened at pleasure for the admission of light, acquires a right to light under sec. 3, of the Prescription Act, (R.S.O. c. 111, s. 35), at the end of twenty years, if he opens the shutters at any time he pleases for the admission of light during those twenty years, and if there is no interruption of the access of light over the neighboring land, as is contemplated by R.S.O. c.111, s. 37. The learned judge also holds that if it be found that the window openings have remained unchanged for twenty years, and that the shutters were so constructed as to open and close at the pleasure of the owner of the building, the onus is thrown upon the owner of the neighboring land to prove that the right has not been acquired, and that it is not necessary to the acquisition of the right that the user should have been continuous.

WILL—CONSTRUCTION—WIFE—LIFE INTEREST TO FUTURE WIFE OF LEGATEE—DIVORCE, EFFECT OF.

In re Morieson, Hitchins v. *Morieson*, 40 Chy. D. 30, is a good illustration of how judges of first instance sometimes jump over decisions of co-ordinate tribunals with which they do not happen to agree. In this case a testator bequeathed a share of his residuary personal estate in trust for his son for life,

and after his decease in trust to pay unto or permit any wife of his son to receive the annual income of his share during her life. The son married a woman, from whom he was divorced, and died without marrying again. The divorced wife claimed the income under the will under the authority of *Bullman* v. *Wynter*, 22 Chy. D. 619. In that case Fry, J., had held that a husband who had been divorced from his wife on his own petition, was entitled on her death to a legacy bequeathed to the wife for life and then "in trust for any husband with whom she might intermarry, if he should survive her, for his life." Kay, J., felt he was not bound by that case because the words of the gift and the facts of the case "were not identical," and though we think that the views of Kay, J., on the law applicable to the case, are clearly preferable to those of Fry, J., we are nevertheless somewhat doubtful whether the reasons he gives for refusing to follow *Bullmore* v. *Wynter*, are altogether tenable, because if no decision of a co-ordinate tribunal is to be regarded as a binding authority, unless the facts are identical, that must give judges of first instance a much wider latitude of decision than our system of law contemplates, the result of which may be to bring some branches of law into a state of chaos, from which only an appellate tribunal can extricate it. Judges, however, must often, as in the present case, be troubled with the fear of putting a suitor to the unnecessary expense of an appeal, by following a decision which they consider is obviously wrong, but we are inclined to think that this consideration is more than counterbalanced by the evil effects which must result, if it comes to be considered an axiom that no decision of a tribunal of first instance can be regarded as an authority except in cases where all the facts "are identical." *Bullmore* v. *Wynter* appears to have been one of those "hard cases" in which a judge succumbs to the temptation to make "bad law."

WILL—CONSTRUCTION—SPECIAL POWER OF APPOINTMENT.

In re Cotton, Wood v. *Cotton*, 40 Chy. D. 41, North, J., had to consider whether a power of appointment had been executed. A testatrix devised, bequeathed and appointed her residuary estate, including all property over which she should have at her death a power of appointment, on trust, after payment thereout of debts, testamentary and funeral expenses, to apply so much as the trustees should think fit of the income during the minority and spinsterhood of her only child, a daughter, for her maintenance, and to accumulate the surplus; and on the daughter attaining twenty-one, or marrying, the whole to her for life, with remainders over. The question was whether this was a valid execution of a special power which the testatrix had to appoint property among her children, settled in default of appointment on such children at twenty-one or marriage. North, J., held that the nature of the trusts declared by the will for the payment of debts and to accumulate the surplus, being contrary to the purposes for which alone the appointment could be made under the special power, sufficiently indicated that it was not the intention of the testatrix to execute the special power, and he therefore declared that there had been no execution of it, and that the property passed in default of appointment as provided by the settlement.

VENDOR AND PURCHASER—CONDITION OF SALE—MISDESCRIPTION—MEASURE OF COMPENSATION.

In re Chifferiel, Chifferiel v. *Watson*, 40 Chy. D. 45, was an application under the Vendors and Purchasers Act, to determine the question of the measure of compensation to which a purchaser was entitled for the misdescription in the particulars of sale, which had described a road over the land as "made up," whereas it was only partly made up; and North, J., held that the proper measure of compensation was not what it would cost to make up the road to the extent represented, but the difference between the value of the property as it existed at the time of the sale and the value it would have had if the road had been "made up" as represented.

RECEIVER AND MANAGER OF BUSINESS—SALE BY COURT—INJUNCTION—RESTRAINT OF TRADE.

In re Irish, Irish v. *Irish*, 40 Chy. D. 49, a business had been carried on by a receiver and manager for ten years under the direction of the Court, and it having been directed to be sold, and a proposal to purchase on condition that the receiver and manager should be bound to refrain from soliciting orders from, or doing any business with the present customers, an application was made for an injunction restraining the receiver accordingly, but North, J., refused the motion, holding that the Court has no power to restrain the carrying on of trade except in enforcement of a covenant to that effect, and that the receiver and manager having accepted his employment without any such obligation being imposed on him, the Court had now no jurisdiction to impose it on him. This case would therefore seem to show that when a receivership of a going concern is likely to be of long continuance, it is desirable that some such condition should be imposed on the receiver on his taking office, otherwise the ultimate sale of the business may be seriously prejudiced.

COMPANY—WINDING UP PETITION—WITHDRAWAL OF PETITION—COSTS.

In re Paper Bottle Co., 40 Chy. D. 52, North, J., held that when a petition for winding up is withdrawn by the petitioner, each set of shareholders, and each set of creditors appearing, whether to oppose or support the petition, is as a general rule entitled to a separate set of costs, even where the petition is presented by the company itself.

DIARY FOR MARCH.

1. Fri.....St. David.
3. Sun .....*Quinquagesima Sunday.*
5. Tue .....Court of Appeal sits. Gen. Sess. and Co. Ct. Sittings for trial in York. Holt, C. J., died 1710. æt. 65.
6. Wed .....Ash Wednesday. First day of Lent. York changed to Toronto, 1834.
10. Sun .....*Quadragesima Sunday.*
13. Wed.....Lord Mansfield born 1704.
17. Sun .....*2nd Sunday in Lent. St. Patrick's Day.*
18. Mon .....Arch. McLean 8th C. J. of Q. B. 1862.
24. Sun .....*3rd Sunday in Lent.*
28. Thu .....Lord Romilly appointed M. R. 1851.
30. Sat.....B. N. A. Act assented to 1867. Reformation in England began 1534
31. Sun .....*4th Sunday in Lent.*

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

MUIR *v.* CARTER.

Appeal—Matter in controversy—Bank shares—Actual value—Opposition—Shares held "in trust"—Substitution—Res judicata.

In this case the appeal arose out of an opposition filed by the appellant to the seizure of thirty-three shares of Molson's Bank stock, part of a larger number seized under a writ of execution to levy $31,125 and interest, pursuant to a judgment obtained in a suit of *Carter* v. *Molson*. The par value of the stock was $50 per share, equal to $1,650; but it was shown by affidavit, to the satisfaction of the learned Chief Justice of the Court of Queen's Bench of the Province of Quebec, that at the time the opposition was filed and the appeal brought, the shares were worth $2,500. The Chief Justice therefore allowed the appeal.

On a motion to quash for want of jurisdiction on the ground that the value of the matter in controversy did not amount to $2,000,

Held, that under sec. 29 of the Supreme and Exchequer Courts Act, the sum or value of the matter in controversy determined the right to appeal, and such value was the actual value of the shares, which was properly established by an affidavit to be over $2,000.

TASCHEREAU, J., dissenting, on the ground that the right to appeal was governed by the statutory value of the shares, $50 per share, and not by their market value.

The appellant, as curator to the substitution created by the will of the late Hon. John Molson, by his opposition, claimed that the shares seized were the property of the substitution. The respondent contested the opposition, pleading *chose jugee*, and that the stock never belonged to the substitution.

At the trial it was proved that the shares had been purchased, when A. Molson was solvent, with moneys belonging to the substitution, and had been entered in the books of the bank as shares belonging to "A. Molson, Esq., in trust;" that he subsequently dealt with them as his own property and pledged them, but that at the time of the seizure the shares had been retransferred to the account of A. Molson in trust for E. A. M., *et al.*

It was also admitted that the interest on these shares had been previously seized; and that, upon an oposition filed by A. Molson as institute under the will, and upon petitions to intervene filed by E. A. M. and E. A. M., *et al*, claiming that the interest being interest on shares forming part of 640 shares belonging to the estate of the late Hon. J. Molson, was not arrestable for A. Molson's debts, the Privy Council dismissed the opposition and rejected the petitions to intervene, but stated that anything decided with regard to the validity of the substitutions would not be binding upon the petitioners as *res judicata*: *Carter* v. *Molson*, 10 App. Cas. 674.

On appeal to the Supreme Court it was

Held, reversing the judgment of the Courts below, that the plea of *res judicata* was not available.

2. That the words "in trust" import an interest in somebody else, and that the evidence clearly establishes that the present appellant as curator to the substitution is the owner of the *corpus* of the shares in question.

Sweeny v. *Bank of Montreal* (12 App. Cas. 617) followed.

Appeal allowed with costs.

Laflamme, Q.C., for appellants.

H. Abbott, Q.C., for respondent.

DANSEREAU *v.* BELLEMARE.

Patent—Carriage-tops—Combination of elements—Novelty.

In an action for damages for the infringement of a patent called "Dansereau's Carriage-Tops," consisting in the combination of

a carriage-top made in folding sections, as described in the specifications, with posts arranged to turn down, the defendant (D.) present, appellant pleaded *inter alia* that there was no novelty, and that the invention was well known and had been in use for a considerable time. At the trial, after considerable evidence had been given for both parties, the judge appointed two experts to examine and compare the carriage-tops of four carriages made by D., and alleged by B. to be infringements on his patents; and also to examine the carriage-top of one carriage in the possession of one C. A. D., alleged to be made on the same principle as B.'s invention, and to have been in use long prior to B.'s patent. One of the experts, a solicitor of patents, reported in favor of B.'s invention, showing the difference between B.'s carriage and C. A. D.'s, and in what consists the improvement. The other, a carriage maker, reported that B.'s carriage was an improvement on C. A. D.'s carriage, but both agreed that D.'s carriages were infringements of B.'s patent. The judge awarded respondent $100 damages, and enjoined D. not to manufacture or sell carriages in infringement of B.'s patent.

On appeal to the Court of Queen's Bench (appeal side), that Court held that the patent for the infringement of which the respondent seeks by his action to recover damages from D. disclosed no new patentable invention or discovery.

On appeal to the Supreme Court of Canada, it was

Held, reversing the judgment of the Court below, RITCHIE, C.J., and GWYNNE, JJ., dissenting, that the combination was not previously in use and was a patentable invention.

Appeal allowed with costs.

Geoffrion, Q.C., for appellant.

St. Pierre, for respondent.

GILBERT *v.* GILMAN.

Appeal—Payments by instalments—Rights in future—Supreme and Exchequer Courts Act, s. 29, s.s. "b."

A judgment of the Court of Queen's Bench for Lower Canada (appeal side), in an action for $1,339.36, being for the balance of one of the money payments which the defendant was to pay to the plaintiff every year so long as certain security given by the plaintiff for the defendant remained in the hands of the Government, is not appealable.

The words, "where the rights in future might be bound," in sub-sec. "b" of sec. 29 of the Supreme and Exchequer Courts Act, relate only to "such like matters" as are previously mentioned in said sub-section.

Appeal quashed with costs.

C. Robinson, Q.C., and *Archibald*, Q.C., for appellants.

Irvine, Q.C., for respondents.

LEWIN *v.* HOWE.

[Nov. 17, 1888.

Mortgagor and mortgagee—Foreclosure — Sale subject to lease—Lease of mortgaged lands without assent of mortgagee.

In a foreclosure suit the Judge in Equity of New Brunswick directed the mortgaged premises to be sold, subject to a lease, to one of the defendants, made after the execution of the mortgage and without the consent of the mortgagee.

On appeal to the Supreme Court of Canada,

Held, that the decree was bad in directing the lands to be sold subject to said lease, and the case should be sent back to the Judge in Equity for a decree directing a sale of the mortgaged premises generally. Appeal allowed.

Weldon, Q.C., and *Gormully*, for appellants

C. A. Palmer, for respondents.

[Dec. 22, 1888.

In the matter of a question submitted by the Railway Committee of the Privy Council for Canada, under sec. 19 of the Railway Act (51 Vict., c. 29, 1888), upon the following case:

Under chap. 5 of the Statutes of Manitoba (passed on the 30th day of April, 1888) the Railway Commissioner of that Province is constructing a railway known as the Portage Extension of the Red River Valley Railway from Winnipeg to Portage la Prairie, both places being within the Province of Manitoba, and he has made application to the Railway Committee of the Privy Council of Canada, under sec. 173 of the Railway Act of 1888 (Canada), for the approval of the place at which, and the mode by which, it is proposed

that the said Portage Extension shall cross the Pembina Mountain branch of the Canadian Pacific Railway (the said branch being part of the Canadian Pacific Railway) at a point within the said Province. Whereupon the following question is submitted:

Is the said Statute of Manitoba, in view of the provisions of chap. 109, Revised Statutes of Canada, particularly sec. 121 thereof, and in view of the Railway Act of 1888, particularly secs. 306 and 307, valid and effectual, so as to confer authority on the Railway Commissioner in said Statute of Manitoba mentioned, to construct such a railway as the said Portage Extension of the Red River Valley Railway crossing the Canadian Pacific Railway, the Railway Committee first approving of the mode and place of crossing, and first giving their directions as to the matters mentioned in secs. 174, 175 and 176 of the said Railway Act?

In answer to the said question, this Court, having heard counsel for the Province of Manitoba, and also for the Canadian Pacific Railway Company, is unanimously of opinion that the said Statute of Manitoba is valid and effectual so as to confer authority on the Railway Commissioner in the said Statute of Manitoba mentioned, to construct such a railway as the Portage Extension of the Red River Valley Railway crossing the Canadian Pacific Railway, the Railway Committee first approving of the mode and place of crossing, and first giving their directions as to the matters mentioned in secs. 174, 175 and 176 of the said Railway Act.

Dated the 22nd day of December, 1888.

E. Blake, Q.C.; *C. Robinson*, Q.C., and *Clarke*, for C. P. Railway.

O. Mowat, Q.C.; *Martin*; *D. McCarthy*, Q.C., and *F. Langelier*, Q.C., for Manitoba.

MANITOBA MORTGAGE CO. *v.* THE BANK OF MONTREAL.

[Feb. 8, 1889.

Partnership—Buying and selling lands on speculation—Lands considered in equity as personalty—Cheque—Payable to order of three—Indorsed by one—Right of bank to pay—Acquiescence by drawer—Monthly statements.

R., K. and M. formed a partnership for the purpose of buying and selling lands on speculation. R. held a power of attorney from M. authorising him to buy, sell and mortgage, and use M.'s name in so doing. R. negotiated a loan with the Manitoba Mortgage Co., and assigned as security certain mortgages given to the three partners, and executed the assignments in M.'s name as his attorney. A cheque for the amount of the loan was drawn by the Mortgage Co., payable to the order of R., K. and M., which cheque was delivered to R., who indorsed it in his own name and as attorney for the other payees, and received the cash. M. afterwards successfully defended a suit by the Mortgage Co. on the covenants in the assignments of mortgage, his defence being that he had received no benefit from the proceeds of the cheque given to R. The company then sued the bank on which the cheque was drawn for the amount of the same, as an unpaid balance of his deposit in said bank.

Held, 1. That lands acquired by partners engaged in buying and selling lands on speculation are, in equity, considered as personalty, and may be so dealt with by the partners.

2. That from the nature of the business, R. had power to effect the loan and make an equitable assignment of the mortgages, which a Court of Equity would compel the other partners to clothe with the legal estate.

3. That R., having such power and having a right to receive cash for the loan, could use the names of his partners in indorsing the cheque, and the bank was justified in assuming that he did so for the purposes of the partnership business and in paying it on such indorsement.

Held, also, that the company, having for two years received monthly statements from the bank in which the cheque so paid affected his balance on deposit, must be considered to have acquiesced in the payment, R. having failed in the meantime, and the position of the bank as to recourse against him being altered for the worse. Appeal dismissed.

Ewart, Q.C., for the appellants.

Robinson, Q.C., for the respondents.

EXCHEQUER COURT OF CANADA.

BURBIDGE, J.] [March 5.

PETERSON *v.* THE QUEEN.

Petition of right—Waiver by the Crown—Jurisdiction.

The Superintendent General of Indian

Affairs, on July 30th, 1880, sold to P. certain lots of land, being part of the Indian Reserve at Sarnia, for $1000, the sale being subject to the condition that P. would, within nine months from the date of sale, erect thereon buildings for manufacturing purposes. One-fifth of the purchase money was paid at the date of the sale; and in August, 1881, although the condition to erect buildings had not been performed, W., the Indian Agent at Sarnia, received the balance of the purchase money from P., stating to him, however, that the sale would not be complete until such condition was complied with.

Held, that the acts of officers of the Crown may constitute a waiver by the Crown, and that the receipt of the balance of the purchase money was, under the circumstances, a waiver of the time within which the condition was to be performed, but not of the substance of the condition.

Quære: Has the Court jurisdiction to declare that a suppliant is entitled to have letters patent issued to him? *Clarke* v. *The Queen* (per SIR WM. J. RITCHIE, C.J., in the Exchequer Court), unreported; *The Canada Central Railway Company* v. *The Queen*, 20 Grant 289, and *The Attorney-General of Victoria* v. *Ettershank*, L.R. 6 P.C. 354, referred to

Petition dismissed, without costs.

S. H. Blake, Q.C., and *J. Adams*, for suppliant.

Wallace Nesbitt, for Crown.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Full C't.] [Feb. 4.

REGINA *v.* WASON.

Constitutional law—51 V., c. 32 (O.)—Ultra vires—B.N.A. Act, s. 91, par. 27—Criminal law.

Held [STREET, J., dissenting], that the Act of the Ontario Legislature, 51 V., c. 32, "An Act to provide against frauds in the supplying of milk to cheese or butter manufactories," is *ultra vires*, as coming within the class of criminal law reserved exclusively to the Parliament of Canada by the B. N. A. Act, s. 91, par. 27.

Per ARMOUR, C.J., the primary object of this Act is to create new offences and to punish them by fine, and in default of payment by imprisonment, and this is its true nature and character.

Per STREET, J.—The punishments imposed by the statute are directed to the enforcement of a law of the Provincial Legislature relating to property and civil rights in the Province; the offences created by it formed no part of the criminal law previously existing, and the apparent object is to protect private rights rather than to punish public wrongs.

E. B. Edwards, for defendants.

C. J. Holman, for complainant.

E. F. B. Johnston, for Attorney-General.

STREET, J.] [Feb. 15.

In re FARLINGER AND VILLAGE OF MORRISBURG.

Municipal corporations — By-law — Bonus to manufactory—51 V., c. 28, s. 16—Registration, R.S.O., c. 184, s. 351—Debentures, R.S.O., c. 184, s. 342, s.s. 1.

A by-law granting a bonus to a manufacturing industry was passed by the municipal council of a village on the 29th October, 1888, after having been submitted to and approved by the electors. It provided on its face that it should take effect on 1st December, 1888. For this and similar by-laws an annual levy was required of an amount exceeding ten per cent. of the total annual municipal taxation of the village.

Held, that although the by-law was in contravention of s.s. 4 of s. 16 of 51 V., c. 28, yet, having regard to the provisions of s. 1, and by the operation of s. 16, s.s. 5, the by-law was withdrawn from the effect of s.s. 4.

2. That s. 351 of R.S.O., c. 184, is merely directory; and the by-law having being passed by a council having jurisdiction to pass it, all the conditions entitling them to pass it having been performed, their power to

pass it not having been improperly exercised, and the by-law itself being in substantial compliance with the provisions of the Act, it would not be proper to declare it invalid for non-registration under a section which does not declare that a non-compliance with its provisions shall have that effect.

3. That the object of s.s. 1 of s. 342 of R.S.O., c. 184, is to prevent the burthen of the debt incurred by borrowing money to pay the bonus from being irregularly distributed or unduly postponed to later years; and that the by-law in question, which provided for the raising of $25,000 by the issue of twenty debentures for $2,006.10, to fall due one in each year for twenty years, "it being estimated that the sale of such debentures will realize the said sum of $25,000," and for levying $2,006.10 in each year by a special rate, substantially complied with s.s. 1 of s. 342.

J. B. Clarke, for applicants.

S. H. Blake, Q.C., and *Fullerton*, for village.

Div'l C't.] [March 7.

Re CRAWFORD *v.* SENEY.

Prohibition—Division Court—Title to land.

The plaintiff agreed to sell to the defendant a parcel of land for $1,750, of which $10 was paid on the execution of the written agreement. The agreement contained no provision as to possession, but the defendant went into possession as the purchaser. The plaintiff was unable to make title, and the defendant continued in possession for a considerable time.

The plaintiff brought a Division Court action for use and occupation. The defendant set up that the contract had not been rescinded when he gave up possession, and that he never became tenant to the plaintiff nor liable to pay rent.

Held, that the plaintiff was bound to prove a contract, express or implied, to pay compensation for the use and occupation, and in order to do so it may have been necessary to show when the contract of sale went off; but that was not a bringing of the title into question so as to oust the jurisdiction of the Division Court.

2. That in prohibition the Court must be satisfied that the title really comes in question; it is not enough that some question is raised by the defendant's notice.

Purser v. *Bradburn*, 7 P.R. 18, distinguished.

Order of STREET, J., striking out jury notice, reversed.

Watson, for appeal.

McSweyn, contra.

STREET, J.] Feb. 19.

In re PRYCE AND CITY OF TORONTO.

Municipal corporations—Damages to land by construction of pavement—Method of estimating—Increase in value—Set-off.

In an arbitration under the arbitration clauses of the Municipal Act a land-owner claimed that certain lands had been injuriously affected by the construction of a block pavement.

Held, that in estimating the land-owner's compensation the arbitrator should set off against the land-owner's claim for damages sustained, the increase in the value of the land arising from the construction of the pavement in which this land shared in common with all the other lands benefited, and not merely such direct and peculiar benefit as accrued to this particular land.

Re Ontario & Quebec R.W. Co. and *Taylor*, 6 O.R. at p. 348, and *James* v. *Ontario & Quebec R.W. Co.*, 12 O.R. at p. 630, followed.

J. E. Robertson, for land-owner.

C. R. W. Biggar, for city.

Div'l C't.] [March 8, 1886.

PURDOM *v.* NICHOL.

Principal and surety—Promissory note—Novation—Partnership.

The plaintiff in 1875 indorsed a promissory note for the accommodation of the defendant, Nichol, and the latter delivered it as collateral security to mortgagees of his freehold.

The mortgagees procured the defendant, Baechler, to enter into partnership with Nichol, and threw off $1,000 of their mortgage debt, releasing their original securities and taking a new mortgage from both defendants for $1,000 less than the amount of their claim. This was in 1876. In 1879, when the note fell due, the plaintiff paid the amount to the

mortgagees, who applied it in reduction of their mortgage debt. At the time the plaintiff paid he did not know of Baechler's connection with the matter.

Held, that the plaintiff was entitled to recover against both defendants for the amount paid as money paid at their request.

This judgment was reversed by the Court of Appeal, 15 A.R. 244, but was affirmed and restored by the Supreme Court of Canada.

Moss, Q.C., for plaintiff.

S. H. Blake, Q.C., for defendant, Baechler.

Chancery Division.

FERGUSON, J.] [Jan. 18.

NELLES *v.* ONTARIO INVESTMENT SOCIETY.

Corporations—Shareholder—Misrepresentation—Rescission of contract for shares.

Action by a shareholder of the Ontario Investment Association to have it declared that his subscription for shares had been obtained by fraud and misrepresentation, and that it was not binding upon him, and for other relief.

It appeared that in 1882 the said Association had amalgamated with the Superior Loan and Savings Society, and under the terms of the amalgamation the shareholders in the latter became entitled, on payment of a premium of 17 per cent., to an equivalent number of shares of the former.

It was thus the plaintiff became entitled to his shares in the Association, having previously been a shareholder in, and manager of, the Superior Loan and Savings Society; and he was an assenting party to the amalgamation, which he now attacked as *ultra vires*, and brought about by misrepresentation and fraud. It was proved that there were many material misrepresentations in a certain report of the Association, dated December 31st, 1881, which had been an important factor in bringing about the assent to the amalgamation by the Society, and in inducing the plaintiff to snbscribe for the shares in the Association, and that the plaintiff had not become aware of their falsity until shortly before bringing this action. It was not shown that the Association was insolvent or on the eve of insolvency.

Held, that the plaintiff was entitled to a rescission of the contract made by his subscription for stock in the Association.

Practice.

FALCONBRIDGE, J.] [March 6.

In re NELSON.

Costs—Taxation—Appeal under rule 854.

The practice upon appeals from pending taxations of costs to the Master in Chambers or the Master in Ordinary under rule 854 should be simple and inexpensive; there is no necessity for a formal order or a counsel fee upon such an appeal.

It is not desirable that any taxation should come more than once by way of appeal before a judge; and where there was an appeal pending the taxation to the Master in Ordinary, and an appeal from his order to a Judge in Chambers, the latter was ordered to stand over till after the close of the taxation.

Haverson, for appeal.

Nelson, contra.

Q.B. Div'l Ct.] [March 7.

BUNBURY *v.* MANUFACTURERS' INS. CO.

Jury notice—Second trial—Rules 670, 671.

This action was entered for trial at the Toronto Autumn Assizes, 1888. Before it was reached the solicitors agreed that the trial should be put off until the January Assizes, and at their request the clerk of assize struck the case off the list for the Autumn Assizes. No notice for jury had been given, and the assent of the Court was not obtained to the postponement of the trial.

Rule 670 provides that where an action has been entered for trial, it may be withdrawn by either the plaintiff or defendant upon producing to the proper officer a consent in writing signed by the parties, but not otherwise except by order.

Held, that the object of this rule was to entitle the defendant to insist upon the trial of a case which the plaintiff had entered being proceeded with, unless the Court should give the plaintiff leave to withdraw it; and what took place here was not a with-

drawal within the meaning of the rule; and the action, having been entered for trial, and not having been tried or disposed of, remained to be tried, and under rule 671 might be set down for trial and notice thereof given for any subsequent court without payment of any further fee.

The plaintiff, before the January Assizes, filed and served a jury notice. R.S.O., c. 44, s. 78, s.s. 2, provides that a party to an action desiring to have it tried by a jury shall, "at least eight days before the sittings at which the action is to be tried," file and serve a notice therefor. R.S.O., c. 52, s. 148, provides that no record containing issues to be tried by a jury shall be entered for trial unless the fee of $3 required by that section be first paid.

Held, that rule 671 was not intended to overrule s. 148, but was only aimed at protecting litigants from being required to pay a new fee for entering their actions for trial a second time, and not to relieve them from the payment of any other usual fees. The plaintiff had the right to give the jury notice for the January assizes, paying the jury fee and annexing the jury notice to the record at the time of setting down.

Order of ROSE, J., striking out jury notice, reversed.

C. Millar, for plaintiff.

T. P. Galt, for defendants.

Appointments to Office.

DEPUTY CLERK OF THE CROWN AND PLEAS, ETC.

Frontenac.

A. McGill, of Kingston, to be Deputy Clerk of the Crown and Pleas, Clerk of the County Court, and Registrar of the Surrogate Court for the County of Frontenac, *vice* John Fraser, deceased.

CORONER.

Glengarry.

A. L. McDonald, M.D., of Alexandria, to be an Associate Coroner for the County of Glengarry.

DIVISION COURT CLERKS.

Wellington.

Lewis R. Adams, of Maryborough, to be Clerk of the Seventh and Twelfth Division Courts of the County of Wellington, *vice* Lucius R. Adams, resigned.

Lambton.

W. W. Stover, of Sombra, to be Clerk of the Fourth Division Court of the County of Lambton, *vice* Peter Cattanach, deceased.

BAILIFFS.

Parry Sound.

A. McDonald, of Strong, to be Bailiff of the Seventh Division Court of the District of Parry Sound, *vice* D. Grummet, resigned.

Kent.

John M. Little, of Blenheim, to be Bailiff of the Fourth Division Court of the County of Kent, *vice* John Little, deceased.

John M. Burk, of Blenheim, to be Bailiff of the Fourth Division Court of the County of Kent, *vice* John Little, deceased.

Victoria.

G. Manning, of Fenelon, to be Bailiff of the Second Division Court of the County of Victoria, *vice* J. Austin, resigned.

Miscellaneous.

A NEW VOLUME.—The one hundred and eightieth volume of *Littell's Living Age* opens with the first number of January. During the long existence of this standard weekly magazine its value has constantly increased, and it can hardly be dispensed with by the American reader who wishes to keep informed in the work of the best writers and thinkers of the day.

The first number of the new year has the following table of contents:—Style, by Walter Pater, *Fortnightly Review;* The Future of Westminster Abbey, by Archdeacon Farrar, *Contemporary Review;* Irish House-keeping, and Irish Customs in the Last Century, *Blackwood;* The Beothuks of Newfoundland, by Lady Blake, *Nineteenth Century;* Society Poets, *Temple Bar;* My Ride to Sheshouan, *Blackwood's Magazine;* Which Wins? *Murray's Magazine;* The Circuits, *Spectator;* The Submission of Great Britain to Queensland, *Economist;* The Training of Kings, *Spectator;* with choice poetry and miscellany. This, the first weekly number of the new volume, is a good one with which to begin a subscription. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

HILARY TERM, 1889.

During the above Term the following gentlemen were called to the Bar, viz. :—*February 4th*—Michael Herman Ludwig, with honours, and gold medal ; Malcolm Wright, William Charles Fitzgerald, John Frederick Gregory, William Samuel Bagsley Hall, James Robinson, Joseph Tweedale Kirkland, William McBeth Sutherland, Arnold Morphy, William Ernest Hastings, William Heber Campbell, Donald Livingston Sinclair, Charles Alexander Ghent, Colin McIntosh, William Edgett Tisdale, Frank William Carey, Franklin Smoke, Alexander Gray Farrell, Heber Stuart Warner Livingston, Samuel W—— McKeown. *February 5th*—John Wesley Ryerson, John B—— McColl, Archibald Weir. *February 9th*—Christopher Robinson Boulton, David Stevenson Wallbridge.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz. :—*February 4th*—A. Morphy, W. E. Tisdale, W. E. Fitzgerald, J. F. Gregory, F. B. Denton, A. Saunders, R. Ruddy, F. Rohleder, J. B McColl, D. S. Wallbridge. *February 5th*—F Smoke, J. W. Coe, C. McIntosh, A. F. Lobb. *February 9th*—E. H. Jackes.

The following candidates passed the Second Intermediate Examination, viz. :—A. W. Anglin, with honours and first scholarship ; J. B. Holden, with honours and second scholarship ; J. H. Denton, with honours and third scholarship ; R. E. Gemmill, J. F. Orde, with honours ; and M. Murdoch, A. Constantinean, A. J. Armstrong, F. J. Roche, W J. Williams, H. Armstrong, W. L. E. Marsh, J Agnew, J. J. O'Meara, F. L. Webb, A. E. Slater, D. W. Baxter, C. Stiles, H. Macdonald, E. S. B. Cronyn, W. Carnew, R. S. Chappell, R. Barrie, J. R. Layton, J. A. Webster, E. G. P. Pickup, A. C. Sutton, A. F. Wilson, R. A. Widdowson, I. Greenizen, A. M. Macdonell, J. A. Ritchie, T. W. Horn, N. Mills, H. P. Thomas, A. Elliot, P. K. Halpin, J. F. Hare, J, Knowles, A. Purdom.

The following candidates passed the First Intermediate Examination, viz :—W. G. Owens, with honours and first scholarship ; N. Simpson, with honours and second scholarship ; R. McKay and J. J Warren, with honours and one-half of third scholarship to each ; W. Campbell, N. B. Gash and C. P. Blair, with honours ; and R. Parker, O. Watson, W. Davis, A. B. Armstrong, F. R. Martin, L. A Smith, K. H. Cameron, A. A Smith, J. McBride, A. R. Walker, J. G. Farmer, S. A. C. Greene, P. E. Ritchie, A. S. Burnham, R H. McConnell, P. A. Malcomson, S. F. Evans, C. B Rae, R. A. Hunt, A. A. Roberts, W. C. McCarthy, F. W. Wilson, J. McEwen, F. C. Cousins, J. H. D. Hulme, C. J. Lucy, T. B. P. Stewart, W. H. Williams.

The following candidates were entered and admitted as Students at-law and Articled Clerks, viz. :—*Graduates*—William Henry Doel, Cyril Haughton McGee. *Matriculants*—George Augustus Harcourt, Frederick Davy Diamond, John Daly Hamilton, David Plewes. *Juniors*—James Clayton Haight, John Ewart Irving, Willard Leroy Phelps, John Sutherland McKay, George Henry Donogh Lee, Albert Forester McMichael, Charles Francis Ellerby Evans, Robert Bradford, Benjamin Tureaund. *Articled Clerks*—George Johnston Ashworth, William Edward Vincent Kelleher.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk as the case may be), on conforming with clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher. and pay $1 fee ; and on or before the day of pres-

entation or examination file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

5. The Law Society Terms are as follows :—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, the affidavit attached to articles must state date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after admission on the books of the society as student or articled clerk.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term. Candidates for Certificates of Fitness are not required to give such notice.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

24. All notices may be extended once, if request is received prior to day of examination.

25. Printed questions put to Candidates at previous examinations are not issued.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, for 1889 and 1890.

Students-at-Law.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Ænei B. V.
- Cæsar, B. G.d,I.) 33.)

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical reading of a selected Poem :—

1889—Scott, Lay of the Last Minstrel.

1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek :—

FRENCH.

A Paper on Grammar.

Translation from English into French Prose.

1889—Lamartine, Christophe Colomb.

1890—Souvestre, Un Philosophe sous le toits.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.

Euclid, Bb. I., II. and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 123 Revised Statutes of Ontario, 1887, and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act; R.S.O. 1887, cap. 44, the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110, 143.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 pér cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers: Best on Evidence; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Michaelmas Term, 1888.

The Canada Law Journal.

VOL. XXV. APRIL 1, 1889. No. 6.

WE regret that our space is so fully occupied with matters which cannot well be postponed, that we are compelled to defer until our next number an obituary notice of the late Sir William Buell Richards.

A SOMEWHAT important point regarding security for costs on appeal arose in *Carroll* v. *Pemberthy*, before the Master in Chambers on March 6th. A motion was made on behalf of the appellants to stay proceedings upon giving security for the amount of the judgment debt, and paying $200 as security for costs, on appeal to the Court of Appeal, into Court. For the respondents, it was objected that the amount to be paid into Court as security for costs should be $400, as required by sec. 71 of the Judicature Act. The appellant relied upon Rules 806 and 1248 as authority for paying in $200 for security where a bond is required for $400. The Master in Chambers held that whether the security was by bond or payment of money into Court, on appeal to the Court of Appeal, it must be in the sum of $400.

IN *Curtin* v. *Curtin*, lately argued on appeal before STREET, J., an interesting aspect of the question of the examination of third parties before trial was discussed. The plaintiff, Mary Curtin, brought an action against the defendant, Lawrence Curtin, her step-son, to set aside a deed from the plaintiff to the defendant of a fee simple in certain farm lands after a life estate reserved to the plaintiff, on the ground that the plaintiff, being illiterate, signed the deed not being aware of its true nature, and upon the understanding that it embodied an agreement as to collateral matters which she subsequently ascertained it did not contain. In the statement of claim it was alleged that one R. I. D., a solicitor, had drawn the conveyance. The plaintiff applied after issue retained to examine the solicitor, R. I. D., under Rule 566. In support of the application the plaintiff's solicitors made an affidavit alleging: "That it is very material (the plaintiff being illiterate) for the proper prosecution of this action on her behalf, that the said R. I. D. should be examined, touching his knowledge of the matters at issue, and as to his instructions for the preparation and execution of said deed, and that such instructions and that the books of the said R. I. D. should be produced for examination. That I believe that it would be useless to endeavor to obtain any information from the said R. I. D. touching the matters in question, unless by an examination under oath, as I believe the said R. I. D. to be acting altogether in the interest of

said defendant in this action." The Master in Chambers made the order asked on the 28th day of February, 1889. An appeal was argued before Mr. Justice Street on the 8th March, 1889. In giving judgment, he said: "The exercise of jurisdiction in ordering examinations of parties under this rule must be carefully guarded. It may be an advantage to have this examination of R. I. D., the solicitor, as it is an advantage to every litigant to know the evidence of witnesses before trial. Nothing more is shown in support of this application than could be shown in the great majority of cases in the courts. It is not a sufficient ground for obtaining the examination, as contended by plaintiff's counsel, that R. I. D. might have been added as a party originally. The order must be reversed, with costs in any event to the defendant."

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE Law Reports for February comprise 12 Q.B.D., pp. 125-238; 14 P.D., pp. 17-26; and 40 Chy. D., pp. 77-215.

MUNICIPALITY—RIGHT TO CARRY WATER MAINS THROUGH PRIVATE PROPERTY—REPORT OF SURVEYOR.

The only point for which *Lewis* v. *Weston*, 40 Chy. D. 55, can be considered an authority is this, that where a municipality is empowered by Act of Parliament to carry water mains through private property, if on the report of their surveyor it is necessary so to do; the surveyor must be the duly appointed surveyor of the municipality, and the report of a surveyor who is appointed surveyor to the board upon the death of its regular officer, "until a further permanent surveyor is appointed," is not a surveyor of the municipality within the meaning of the Act, and the municipality in this case having acted on a report of a surveyor temporarily appointed as above mentioned, was restrained by Stirling, J., by injunction from proceeding further with the work, and this, notwithstanding that the surveyor who had been subsequently appointed by the municipality, made affidavit that he concurred in the report of the temporary surveyor: the learned judge declaring that as the defendants were seeking to avail themselves of the powers conferred by the statute to take lands in derogation of the plaintiff's rights, they must follow strictly the terms of the power, and their proceedings being based on a report of one who was not their surveyor within the meaning of the Act, were consequently null and void.

LANDLORD AND TENANT—NUISANCE—COVENANT FOR QUIET ENJOYMENT—INJUNCTION—DAMAGES.

Jenkins v. *Jackson*, 40 Chy. D. 71, was an action brought by a tenant against his landlord to restrain a nuisance under the following circumstances: The landlord let a flat in a building to the plaintiff for the purpose of his business as an auctioneer, giving the usual covenant for quiet enjoyment; subsequently he gave a license to his co-defendant to use a floor above that leased to the plaintiff, for the purpose of dancing and other entertainments. The plaintiff complained that the dancing was a nuisance, and that the visitors to the upper flat obstructed him in the enjoyment of his premises. Kekewich, J., held that the annoyance caused

by the dancing was not a breach of the covenant for quiet enjoyment, that such covenants do not extend to nuisances committed on adjoining premises of the lessor, and therefore he refused an injunction: but on the general law he held that a lessor is responsible in damages to his tenant if he so uses his adjoining premises as to create a nuisance to his tenant, and he therefore awarded damages in respect of the nuisance caused by the dancing; but he held that neither the landlord nor his licensee were responsible for the inconvenience to the plaintiff caused by the visitors on the staircase.

JURISDICTION—"CAUSE OF ACTION ARISING WHOLLY OR IN PART WITHIN THE CITY OF LONDON" —ASSIGNMENT OF DEBT.

In *Read* v. *Brown*, 22 Q.B.D. 128, an appeal was brought from an order of Sir James Hannen directing a prohibition to issue to the Mayor's Court, under the following circumstances: The action was brought by the plaintiff as assignee to recover a debt in respect to the price of goods. The goods had been sold and delivered without the City of London, but the debt had been assigned to the plaintiff within the city. The question therefore was whether the assignment was a part of "the cause of action." Pollock, B., and Manisty, J., held that it was, and this decision was affirmed by the Court of Appeal. (Lord Esher, M.R., and Fry and Lopes, L.JJ.) The Master of the Rolls adopted the definition of the term "cause of action" laid down in *Cooke* v. *Gill*, L.R. 8 C.P. 107, viz.: "Every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved." The order for the prohibition was therefore reversed.

DEFAMATION—LIBEL—PRIVILEGE— INNUENDO—PUBLICATION IN TRADE NEWSPAPERS OF LIST OF JUDGMENTS.

Williams v. *Smith*, 22 Q.B.D. 134, is a case which shows the dangers that trade protection papers may run. The action was brought to recover damages for a libel, which consisted in the defendants having published, in a trade protection paper of which they were proprietors, in a list of judgments recovered in the County Court, a statement that a judgment was recovered against the plaintiff, "meaning thereby that there was at the date of the publication an unsatisfied judgment against the plaintiff for the amount mentioned." The facts being, that a judgment for the amount mentioned had been recovered against the plaintiff, but that, prior to the publication of the alleged libel, the plaintiff had satisfied it, but he had given no notice to the officer of the Court that the judgment had been satisfied, and the defendants were not aware that the judgment had been satisfied, but had taken the list of judgments from another trade paper, in which to the list of judgments the following note was appended: "These judgments are not necessarily for debts. In some cases they are for damages or properly disputed causes of action, but no distinction is made in the register. Judgments settled otherwise than through the Court may appear

unless satisfaction is entered up within fourteen days allowed for that purpose." The jury found a verdict for £25 in favor of plaintiff, and the Divisional Court (Pollock, B., and Mainsty, J.) refused to disturb it, holding that the statement was susceptible of the innuendo that the judgment was still unsatisfied.

LANDLORD AND TENANT—COVENANT BY LESSOR TO PAY RATES, TAXES AND IMPOSITIONS—WATER RATE.

Badcock v. *Hunt*, 22 Q.B.D. 145, was an action by tenants against their landlord upon a covenant in the lease, whereby the lessor covenanted to pay all rates, taxes and impositions whatsoever, whether parliamentary, parochial, or imposed by the City of London, or otherwise howsoever, which then were, or thereafter might be, rated, charged or assessed on the said premises, or any part thereof, or on the said yearly rent, or on the landlord, owner, or tenants, of the said premises, in respect thereof. Water was supplied to the premises for domestic purposes by the New River Company, under the provisions of the Waterworks Clauses Act, 1847, and the lessees paid the water rates, which they now claimed to recover from the defendant. The question, therefore, was whether the water-rates were "imposed." The Court of Appeal (Lord Esher, M. R., and Fry and Lopes, L.JJ.), over-ruled Field and Wills, JJ., and held unanimously that the rates were not "imposed." Lord Esher says, "I do not think that a charge to which a person can only be made liable with his own consent, can be said to be imposed upon him within the meaning of this covenant." . . . "Furthermore, I think that the words 'imposed otherwise howsoever' must be construed according to the rule of construction applicable when general words follow specific words, and that therefore they can only include rates or impositions imposed in a similar manner to parliamentary and parochial rates, viz., imposed compulsorily on the person charged."

PRACTICE—EXECUTION—RECEIVER—EQUITABLE EXECUTION.

In *The Manchester & Liverpool Banking Co.* v. *Parkinson*, 22 Q.B.D. 173, the Court of Appeal has put a check on the practice of obtaining the appointment of a receiver by way of equitable execution, by laying down the rule that that mode of procedure should not be adopted when the ordinary course of obtaining execution of a judgment may be resorted to. In this case the judgment debtor had died, leaving a will whereby she appointed an executor. At the time of her death she was possessed of certain furniture and chattels, and was carrying on business. The will not having been proved and the judgment remaining unsatisfied, the judgment creditors obtained an order appointing a receiver of the furniture, chattels and business, and to get in and receive the debts due to the business, and afterwards another order for the sale of such property by the receiver. Pollock, B., and Manisty, J., set aside these orders, and an appeal from them was had to the Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.), which affirmed their decision. The case of *Whitaker* v. *Whitaker*, 7 P.D. 15, was considered not to be an authority for the appointment of a receiver under such circumstances.

BANKRUPTCY—PETITIONING CREDITOR—RECEIVER.

In re Sacker, 22 Q.B.D. 179, it was decided by the Court of Appeal that an interim receiver in an action is not competent to be a petitioning creditor in bankruptcy against the defendant, against whom he has been appointed, upon his default in paying over moneys to the receiver pursuant to the order of the Court.

RECEIVER BY WAY OF EQUITABLE EXECUTION—BANKRUPTCY—SECURED CREDITOR.

In re Dickinson, 22 Q.B.D. 187, the Court of Appeal also held that a judgment creditor who has procured the appointment of a receiver of chattels of his debtor by way of equitable execution, is not a secured creditor, and in the event of the bankruptcy of the debtor, the trustee in bankruptcy is entitled to the chattels then unsold as against the receiver.

EASEMENT—RIGHT OF WAY—GRANT OF WAY BY GENERAL WORDS—"WAYS NOW OR HERETOFORE HELD OR ENJOYED."

Roe v. *Siddons*, 22 Q.B.D. 224, is a decision of the Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.), reversing a decision of Cave and A. L. Smith, JJ., upon a question arising in the construction of certain words used in a conveyance. In 1872 the owner of two adjoining parcels of land granted one of them to the plaintiff and the other to the defendant. In the grant to the plaintiff were the general words: "together with all ways and easements and appurtenances whatsoever to the said tenement and premises hereby granted, or any part thereof now *or heretofore* held or enjoyed or reputed or known as part or parcel thereof or appurtenant thereto." Prior to 1852 the occupiers of the two tenements had used in common a formed private road for the purpose of going to and from their respective tenements to the high road. There was access to the plaintiff's tenement from the high road by another way, but the only access to the defend ant's tenement was by means of that road. In 1852, by the permission of the owner, the then occupier of the plaintiff's tenement built a wall which entirely separated his tenement from the private road, and from that time down to 1872 and afterwards, with one exception, down to the issue of the writ, the occupiers of the plaintiff's tenement made no use of the private road. Cave was of opinion that the right of way existing in favor of the owners of the plaintiff's premises prior to 1852, passed under the general words as a way "heretofore held or enjoyed," but from this A. L. Smith, J., dissented, and the Court of Appeal arrived at the same conclusion as he did. The Court of Appeal base their decision on the ground that in order to maintain the plaintiff's right to the way in question, it would be necessary to alter the physical condition of the property from what it was at the time of the grant to the plaintiff, to what it formerly was, and this they considered prevented the ordinary general words from being treated as disclosing any intention to give the right.

None of the cases in the Probate Division seem to require notice here.

INJUNCTION—RESTRICTIVE COVENANT—ANNOYANCE AND GRIEVANCE.

Turning now to the cases in the Chancery Division, the first requiring attention is *Tod-Heatly* v. *Benham*, 40 Chy. D. 80. This was an action for an injunction

to restrain the breach of a restrictive covenant against carrying on certain specified trades, or doing any act "which shall, or may be, or grow to the annoyance, nuisance, grievance or damage of the lessor, his heirs or assigns, or the inhabitants of the neighboring or adjoining houses." The alleged breach of this covenant consisted in the defendant having established a hospital on the land for treatment of outdoor patients suffering from diseases of the throat, nose, skin and eye, fistula and other diseases. The right of the plaintiffs to an injunction was resisted on the ground that the hospital was not an actionable nuisance, but both Kekewich, J., and the Court of Appeal (Cotton, Lindley & Bowen, L.JJ.) were of opinion that it was not a question whether a nuisance had been committed, but whether what was complained of was a breach of the covenant, and they held that without proof of any actual damage the plaintiffs were entitled to an injunction as asked; as Bowen, L.J., says at p. 98: "Annoyance is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but the ordinary sensible English inhabitant of a house—if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort." Here the fact of the existence of the hospital being the means of bringing a number of people into the neighborhood suffering from diseases of the eyes, etc., etc., was held to be a reasonable ground for apprehension that there was danger of spreading infectious or contagious diseases in the neighborhood.

RAILWAY COMPANY—ARBITRATION—JURISDICTION—WAIVER.

In *London, Chatham & Dover Railway Co.* v. *Southeastern Railway Co.*, 40 Chy. D. 100, the Court of Appeal (Cotton, Lindley & Bowen, L.JJ.), held, that though when parties have agreed to refer disputes arising between them to arbitration, the Courts are bound to give effect to the agreement if either party insist on it; yet that if neither of them do insist on it, the jurisdiction of the Court is not ousted by the existence of such an agreement; and therefore when a defendant had by his pleadings set up the agreement and his right to arbitration, but at the trial failed to raise the point, and went into evidence on the merits, it was held that the point could not afterwards be raised in the Court of Appeal.

BOND—CONDITION IN RESTRAINT OF TRADE—SPECIFIC PERFORMANCE—INJUNCTION—PENALTY—LIQUIDATED DAMAGES.

National Provincial Bank of England v. *Marshall*, 40 Chy. D. 112, was an action on a bond executed by the defendant in the general sum of £1000 on entering the plaintiffs' service as bankers, conditioned that it should be void if the defendant should perform his duty as therein mentioned, and also if he should pay to the plaintiffs £1000 as liquidated damages in case he should at any time within two years after his leaving the plaintiffs' service accept any employment in any other bank within twenty miles of the plaintiffs' bank. The defendant resigned his employment and immediately entered the service of a rival bank in

the same town. The plaintiffs claimed an injunction to restrain the defendant from holding employment in any rival bank contrary to the terms of the bond. The defendant was willing and offered to pay the £1000, but Butt, J., held the plaintiffs entitled to an injunction, and his decision was affirmed by the Court of Appeal (Cotton, Lindley & Bowen, L.JJ.)

COMPANY—RATIFICATION BY COMPANY OF PARTICULAR ACT OF DIRECTORS IN EXCESS OF AUTHORITY —ALTERATION OF ARTICLES.

Grant v. *United Kingdom Switchback Co.*, 40 Chy. D. 135, is a decision of the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.), affirming a judgment of Chitty, J., on a question of company law. The articles of the *T. Company* authorized the sale of part of its undertaking to any other company, and contained a provision prohibiting any director from voting in respect of any contract in which he is interested. The directors of the *T. Company* entered into a contract to sell part of its undertaking to the *U. Company*, of which all the directors of the *T. Company*, except one, were directors. A general meeting of the *T. Company* was called by a notice stating that it was called to consider a resolution for approving and adopting the agreement, but not stating any ground for a meeting being necessary. The resolution was passed as an ordinary resolution, and not as a special resolution. The plaintiff was a shareholder of the *T. Company*, and brought his action against both companies to restrain them from carrying out the sale, and it was held by the Court that though a resolution giving the directors powers to do certain acts in future which they were not authorized by the articles to do, would be an alteration of the articles, and would require to be passed as a special resolution, the adoption of a contract which was within the objects of the company, but which the directors had entered into without authority, was not an alteration of the articles, and could be effected by an ordinary resolution ; and it was also held that the resolution of the general meeting was not invalidated by the fact that the notice calling the meeting did not suggest any reason why the contract could not be carried into effect without the sanction of a general meeting.

COMPANY—WINDING UP—DIRECTOR—TRUSTEE—BREACH OF TRUST—BROKERAGE.

In re Faure Electric Co., 40 Chy. D. 141, was an application in a winding up proceeding against directors to make them liable for alleged acts of misfeasance in the execution of their office. The articles of association provided that no transfers of shares not fully paid up should be registered unless "approved" by the directors. M., a stock jobber, offered to take a large number of £10 shares at par, paying £2 per share at once, provided the directors paid a commission to the stock-broker who had introduced the shares to him. The directors agreed to this and allotted the shares to M., he paying £2 per share, and they paid a commission of 2s. 6d. per share to the broker, the total amount of the commission so paid being £937 10s. M. subsequently transferred the shares to P., who was already a shareholder and had recently been elected a director, and the directors sanction the transfer, believing P. was a proper person to take a transfer of the shares, and having been advised by their solicitor that there was no valid objection to it. P. afterwards became bankrupt, being indebted to the company in the balance

of £8 per share. The company having been ordered to be wound up, the liquidators claimed to recover from the directors damages for sanctioning the transfer to P., and also repayment of the commission paid to the broker as being *ultra vires*. Upon the evidence it was held by Kay, J., that the directors had duly exercised their judgment in approving of the transfer of the shares to P., and were not liable for any damages resulting therefrom, no dishonest dealing being charged; but the payment of the commission he held to be *ultra vires*, and ordered it to be refunded with interest.

WILL—CONSTRUCTION—RESIDUE—INTESTACY—GIFT OF RESIDUE "TO EXECUTORS OF EXECUTORS OR ADMINISTRATORS OF M. AND J."—GIFT OF RESIDUE BY J. TO TESTATOR.

In re Valdez, 40 Chy. D. 159, presents a somewhat curious state of facts. One Valdez, who died 5th June, 1887, by his will dated 17th November, 1851, bequeathed the residue of his estate to Mary Hunter and Jemima Hunter, whom he appointed his executors, and in case of their decease in his lifetime then he bequeathed what he had bequeathed to them to their executors or administrators. Jemima Hunter died in the lifetime of Valdez on the 21st November, 1855, and by her will she bequeathed her residuary estate to Valdez. Mary Hunter died 15th July, 1887, and the petitioner as her administrator duly proved the will of Valdez; and the question was whether or not Valdez was to be considered to have died testate or intestate as regards the moiety of the residue of his estate which he had purported to bequeath to Jemima Hunter, and which under the residuary devise in her will would return to him. Kay, J., held that as to this moiety he must, in the events which had happened, be deemed to have died intestate, and that as the property was not required to pay the debts of Jemima Hunter, it was equivalent to a gift to her executors in trust for Valdez himself.

MARRIED WOMAN—CHOSE IN ACTION—TITLE OF HUSBAND—PROBATE OF INVALID WILL OF MARRIED WOMAN—ACTION BY HUSBAND AGAINST EXECUTOR OF HIS WIFE.

Smart v. *Trauter*, 40 Chy. D. 165, is a case which shows that the old practice of turning a suitor out of Court because he has mistaken his forum is even yet not quite a thing of the past. In this case the action was brought by a widower against the executor of his deceased wife, claiming to be entitled to her *choses in action* on the ground that his wife had no separate property and no testamentary capacity by assent of her husband or otherwise; but it was held by Kay, J., that the husband suing the executor in the Chancery Division must treat the will as valid, and that in order to establish his right to the *choses in action* he must take proceedings in the Probate Division to recall the probate, and obtain letters of administration to his deceased wife.

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

The following is a *résumé* of the proceedings of Convocation on the 4th day of January and during Hilary Term, 1889.

Friday, 4th January.

Convocation met.

Present—Sir Alexander Campbell, and Messrs. Beaty, Cameron, Ferguson, Foy, Guthrie, Hardy, Irving, Kerr, Kingsmill, Lash, Mowat, Martin, Mackelcan, Meredith, Moss, Murray, Shepley, Smith.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting of Convocation were read and approved.

The Secretary read the letter of the Treasurer *re* Mr. J. G. Currie, and informed Convocation that Mr. Currie's application for re-instatement on the Roll of Solicitors was enlarged until 8th inst., to give the Society an opportunity of appearing on the motion.

Mr. Currie's petition for re-instatement and affidavits in support of it, were laid on the table.

Ordered, that the matter be referred to the Discipline Committee, with power to act as they deem proper.

Mr. Martin then brought up the consideration of the resolutions for the establishment of the Law School, specially appointed as the first order of the day.

Mr. Martin moved the adoption of paragraph 2 as a whole.

Mr. Meredith, seconded by Mr. Beaty, moved in substitution :

"That it is not expedient at present to express an opinion as to the desirability of entering into arrangements with any University for the joint education of students."

Yeas—Messrs. Moss, Meredith, Beaty, Lash, Smith, Kingsmill, Hardy, Kerr.—8.

Nays—Messrs. Martin, Shepley, Murray, Ferguson, Foy, Mackelcan, Sir A. Campbell.—7.

The amendment of Mr. Meredith carried.

Mr. Martin moved, seconded by Mr. Shepley, the adoption of the 3rd paragraph as amended. *Carried.*

Mr. Martin moved the adoption of the 5th paragraph. *Carried.*

Mr. Martin, duly seconded, moved the adoption of the 6th paragraph as amended.

Mr. Meredith moved, seconded by Mr. Hardy :

"That the 6th paragraph of the report be amended by striking out all the words after the word 'courses' in the third line, and substituting the following: 'All other students shall not be required, but shall be permitted, if they so desire, to attend the lectures and other methods of instruction.'" *Lost.*

Yeas—Messrs. Meredith, Hardy, Mackelcan, Guthrie.—4.

Nays—Messrs. Moss, Martin, Shepley, Murray, Ferguson, Beaty, Lash, Smith, Kingsmill, Foy, Kerr, Sir A. Campbell.—12.

Mr. Hardy moved, seconded by Mr. Lash:

"That the words 'two courses' in the last line of the 6th paragraph, as it appears in its amended form, be struck out, and the words 'one course' be substituted therefor."

Yeas—Messrs. Meredith, Beaty, Lash, Hardy, Mackelcan, Guthrie.—6.

Nays—Messrs. Moss, Martin, Shepley, Murray, Ferguson, Smith, Kingsmill, Foy, Kerr, Sir A. Campbell.—10.

Mr. Martin then moved the adoption of the 6th paragraph, as follows:

The attendance at the lectures and other methods of instruction shall be compulsory, as follows:

"Students under service or in attendance in Toronto during the last two years of their course and more shall be required to take three courses. All other students shall be required to take two courses."

The 6th paragraph in this form was carried.

The 7th paragraph was carried, Mr. Meredith voting against it.

The 8th paragraph was carried.

The 8th *a* paragraph was carried.

The 9th paragraph was carried.

The further consideration of the Report and Resolutions *re* the Law School was adjourned until the first Wednesday in Hilary Term (6th February, 1889), and a call of the Bench ordered for that day.

Ordered, that the Secretary do cause to be printed the proceedings of to-day, and do distribute the same to the Benchers.

The Rule relating to the loaning of books from the Library, which was read a first time on 26th December, was read a second and third time, was adopted and is as follows:—

RULE.

1. Text books of which duplicates are in the Library, at least one copy of the latest edition being always retained there.

2. Legal periodicals as follows:—*Albany Law Journal, American Law Register, American Law Review, Bookseller (The English), Canada Health Journal, Central Law Journal, Criminal Law Magazine, Gibson's Law Notes, Irish Law Times, Journal of Jurisprudence, Law Journal* (English paper, not Law Journal Reports), *Law Magazine and Review, Library Journal, Law Times* (English paper, not Law Time Reports), *Legal News, Lower Canada Jurist* (not Reports), *Law Quarterly Review* (Pollock), *Literary News, Solicitor's Journal*, may be taken over night, to be returned at the next morning's opening of the Library.

Books relating to literature other than legal literature, may be taken for a week, this definition not to include Books of Reference, Dictionaries and Encyclopædias.

The above named books are available to Barristers and Solicitors who are members of the Law Society only, upon application to the Librarian, whose duty it shall be to issue them on such application, if the applicant shall not have disregarded these rules previously, taking a receipt on which shall be recorded the time of the return of the book and its condition.

Convocation adjourned.

HILARY TERM, 1889.

During the above Term the following gentlemen were called to the Bar, viz.:

February 4th.—Michael Herman Ludwig, with honors and gold medal;

Malcolm Wright, William Charles Fitzgerald, John Frederick Gregory, William Samuel Bagsley Hall, James Robinson, Joseph Tweedale Kirkland, William McBeth Sutherland, Arnold Morphy, William Ernest Hastings, William Heber Campbell, Donald Livingston Sinclair, Charles Alexander Ghent, Colin McIntosh, William Edgett Tisdale, Frank William Carey, Franklin Smoke, Alexander Gray Farrell, Heber Stuart Warner Livingston, Samuel W—— McKeown.

February 5th.—John Wesley Ryerson, John B—— McColl, Archibald Weir.

February 9th.—Christopher Robinson Boulton, David Stevenson Wallbridge.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz.:

February 4th.—A. Morphy, W. E. Tisdale, W. E. Fitzgerald, J. F. Gregory, F. B. Denton, A. Saunders, R. Ruddy, F. Rohleder, J. B. McColl, D. S. Wallbridge.

February 5th.—F. Smoke, J. W. Coe, C. McIntosh, A. F. Lobb.

February 9th.—E. H. Jackes.

The following candidates passed the Second Intermediate Examination, viz.:

A. W. Anglin, with honors, 1st scholarship; J. B. Holden, with honors, 2nd scholarship; J. H. Denton, with honors, 3rd scholarship.; R. E. Gemmill, J. F. Orde, with honors; and M. Murdoch, A. Constantineau, A. J. Armstrong, F. J. Roche, W. J. Williams, H. Armstrong, W. L. E. Marsh, J. Agnew, J. J. O'Meara, F. L. Webb, A. E. Slater, D. W. Baxter, C. Stiles, H. Macdonald, E. S. B. Cronyn, W. Carnew, R. S. Chappell, R. Barrie, J. R. Layton, J. A. Webster, E. G. P. Pickup, A. C. Sutton, A. F. Wilson, R. A. Widdowson, I. Greenizen, A. M. Macdonell, J. A. Ritchie, T. W. Horn, N. Mills, H. P. Thomas, A. Elliot, P. K. Halpin, J. F. Hare, J. Knowles, A. Purdom.

The following candidates passed the First Intermediate Examination, viz. :—

W. G. Owens, with honors, 1st scholarship; N. Simpson with honors, 2nd scholarship; R. McKay and J. J. Warren, with honors, and one-half of 3rd scholarship to each; W. Campbell, N. B. Gash and C. P. Blair, with honors; R. Parker, O. Watson, W. Davis, A. B. Armstrong, F. R. Martin, L. A. Smith, K. H. Cameron, A. A. Smith, J. McBride, A. R. Walker, J. G. Farmer, S. A. C. Greene, P. E. Ritchie, A. S. Burnham, R. H. McConnell, P. A. Malcomson, S. F. Evans C. B. Rae, R. A. Hunt, A. A. Roberts, W. C. McCarthy, F. W. Wilson, J. McEwen, F. C. Cousins, J. H. D. Hulme, C. J. Lucy, T. B. P. Stewart, W. H. Williams.

The following candidates were entered on the books as Students-at-Law and Articled Clerks, viz. :—

Graduates.—William Henry Doel, Cyril Haughton McGee.

Matriculants.—George Augustus Harcourt, Frederick Davy Diamond, John Daly Hamilton, David Plewes.

Juniors.—James Clayton Haight, John Ewart Irving, Willard Leroy Phelps, John Sutherland McKay, George Henry Donogh Lee, Albert Forester McMichael, Charles Francis Ellerby Evans, Robert Bradford, Benjamin Tureaund.

Articled Clerks.—George Johnston Ashworth, William Edward Vincent Kelleher.

Monday, 4th February.

Convocation met.

Present—The Treasurer, and Messrs. Beaty, Ferguson, Fraser, Hoskin, Irving, Kingsmill, Meredith, Moss, Murray, Shepley.

The minutes of last meeting were read and approved.

The Report of the Special Committee as to honors and scholarships in connection with call to the Bar was received and read.

Ordered for immediate consideration and adopted.

Ordered that M. H. Ludwig be called to the Bar with honors and receive a gold medal.

Ordered that the Secretary do give notice that candidates for call to the Bar, who desire to be called, do attend on the first day of Term at 11.45 a.m., punctually.

Ordered that the Reports of the Examiners on the Intermediate Examinations, presented on first day of Term, be deferred to the second day of each Term, and be taken up with the Report on Special Cases on that day.

The Report of the Special Committee on honors and scholarships in connection with the First Intermediate Examination was received and read.

Ordered that Messrs. Owens, Simpson, McKay, Warren, Campbell, Gash and Blair be declared to have passed the First Intermediate Examination with honors.

Ordered that W. G. Owens receive a scholarship of one hundred dollars, N. Simpson a scholarship of sixty dollars, and that R. McKay and J. J. Warren, being equal, do receive a scholarship of forty dollars, to be divided between them.

Mr. Murray presented the Report of the Finance Committee as follows:—

1. They have caused a balance sheet showing the receipts and expenditure for 1888, to be prepared and audited by the Society's auditor.
2. They have also prepared a sheet showing the estimates for the year 1889, and submit the same herewith.
3. Your Committee have had under consideration the question of the salary of Mr. Grasett, the first General Assistant of the Secretary, and your Committee recommend to Convocation that the salary of Mr. Grasett be increased from eight hundred to one thousand dollars per annum, such increase to commence from the first day of July, 1888.

February 4th, 1889.

The report was received and read.

Ordered that it be considered forthwith paragraph by paragraph.

Ordered that the consideration of the first and second paragraphs be deferred till to-morrow.

The third paragraph was adopted.

ABSTRACT OF BALANCE SHEET FOR 1888.

Receipts.

Certificate and Term Fees	$22,507 47	
Less Fees returned	124 75	
		$22,382 72
Notice Fees	$706 00	
Less Fees returned	1 00	
		705 00
Attorneys' Examination Fees	$7,607 00	
Less Fees returned	1,402 50	
		6,204 50

Students' Admission Fees	$8,529 00	
Less Fees returned	839 00	
		$7,690 00
Call Fees	$12,659 00	
Less Fees returned	1,623 00	
		11,036 00
Interest and Dividends		3,752 97
SUNDRIES:—		
Fees on Petitions, Diplomas, etc		159 00
Fines, Lending Library Account		15 90
Fees, Telephone Office		186 14
Rowsell & Co., Reports sold	$1,001 65	
" " Digests "	2,462 22	
		3,463 87
Conscience Money		10 00
		$55,606 10

Expenditure.

REPORTING:—		
Salaries	$9,021 92	
Printing—Reports, $7,906.22; Digest, $1,484.67	9,390 89	
Disbursement, re Election Reports	50 00	
Notes for Law Journal	298 08	
		$18,760
EXAMINATIONS:—		
Salaries	$3,200 00	
Scholarships, $1,400; Special Examination re same, $37.30	1,437 30	
Printing and Stationery	277 80	
Examiners for Matriculation	324 00	
Law Journal Account	100 00	
		5,339 10
LIBRARY:—		
Books, Binding, and Repairs at Osgoode Hall Library		3,308 22
County Libraries Aid		4,276 00
GENERAL EXPENSES:—		
Salaries—		
Secretary and Librarian	$2,000 00	
Assistants	1,400 00	
Housekeeper	525 00	
		3,925 00
Lighting, Heating, Water, and Insurance—		
Gas	$311 85	
Water	128 14	
Insurance (for three years)	990 00	
Ontario Government, for Steam Heating	850 00	
Fuel	255 13	
Repairs to Apparatus	63 38	
		2,598 50
Grounds—		
Gardener	$317 73	
Labor	360 00	
Snow Clearing	35 35	
		713 08
SUNDRIES:—		
Postage	$ 88 20	
Advertising	30 00	
Stationery, Printing, etc	428 71	
Law Costs	607 22	
Furniture, Ordinary, $1,288.61; Book Cases, for re-arrangement of Library, $1,405.60	2,694 21	
Portraits: Galt, C. J.; Armour, C. J.	800 00	
Roberts, renovating, $14.00, and moving pictures, $10.75	24 75	
Guarantee Co	20 00	

Auditor	$100 00	
Term Lunches (83 Meetings)	892 32	
Ice	17 50	
Telephone Office, $602; additional grant, Miss Cameron, $72	674 00	
Stenographers, for Discipline Committee	32 00	
Repairs, $172.37; Tenant (Carpenter) $68.59; Door Springs, $28.95	269 91	
Legal Charts, $100; Printing Resumé, $42; Ontario Directory, $5	147 00	
Expenses, Grasett, *re* Solicitors in default	124 20	
Attending to Clocks	10 00	
Keys, Locks, and Paper, for Lavatory, $48.50; Soap for same $17.35	65 85	
Brooms and Soap for house cleaning	22 70	
Dusting Books, $25.65: Oiling floor, $8.00	33 65	
Petty Charges	60 42	
		$7,142 64
		$46,063 43
Balance		9,542 67
		$55,606 10

Audited and found correct.

HENRY WM. EDDIS, *Auditor.*

TORONTO, 29th January, 1889.

ESTIMATES FOR 1889.

Receipts.

Certificate and Term Fees	$22,300 00	
Notice Fees	625 00	
Attorneys' Examination Fees	6,000 00	
Students' Admission Fees	6,500 00	
Call Fees	8,500 00	
Interest and Dividends	3,750 00	
SUNDRIES:—		
Petitions and Diplomas	150 00	
Fines on Books not Returned on Time	15 00	
Reports Sold	350 00	
Digests Sold	100 00	
Telephone Receipts	200 00	
		$48,490 00

Expenditure.

REPORTING:—		
Salaries	$9,700 00	
Printing	5,600 00	
Notes for Law Journal	300 00	
		15,600 00
EXAMINATIONS:—		
Salaries	$3,200 00	
Scholarships	1,600 00	
Printing and Stationery	275 00	
" " for Examination in connection with Law School	300 00	
Prizes	50 00	
Examiners for Matriculation	350 00	
Law Journal Account, Advertising	100 00	
Medals	150 00	
		6,025 00

LIBRARIES :—		
Osgoode Hall, Books, Binding, and Repairs	$3,500 00	
Book Cases in connection with Improvements	900 00	
County Libraries Aid	2,400 00	
Inspector of County Libraries	100 00	
		$6,900 00
GENERAL EXPENSES :—		
Salaries—		
Secretary and Librarian	$2,000 00	
Assistants	1,600 00	
Arrears, Grasett's increase, $100	100 00	
Housekeeper	525 00	
		4,225 00
Lighting, Heating, Water, and Insurance—		
Gas	$300 00	
Water	100 00	
Insurance on Stock of Reports	90 00	
Payment to Government for Steam Heating	850 00	
Fuel	250 00	
Repairs to Apparatus	50 00	
		1,640 00
Grounds—		
Gardener, Contract, $260; Flowers, $40	$300 00	
Labor, P. O'Brien	360 00	
Snow Clearing	40 00	
		700 00
REPAIRS AND FURNITURE :—		
Repairs	$250 00	
Furniture	100 00	
Picture Frames, Galt C.J., Armour C.J.	178 00	
		528 00
STATIONERY, ADVERTISING, &c. :—		
Postages	$ 90 00	
Advertising	40 00	
Stationery and Printing, General Account	100 00	
Resumé	40 00	
Copies for distribution	15 00	
Stenographer for Discipline Committee	40 00	
Legal Chart	100 00	
Directory	5 00	
		430 00
Law Costs	$1,250 00	
Guarantee Co., half premium	20 00	
Auditor	100 00	
Term and Committee Lunches	900 00	
Ice	20 00	
Telephone Office	650 00	
100 keys for Lavatory	15 00	
Soap "	15 00	
Brooms and Soap for Cleaning Building	20 00	
Dusting Books, $25; Oiling Floor, $10	35 00	
Petty Charges	50 00	
		3,075 00
Estimated Balance		9,367 00
		$48,490 00

Mr. Murray presented the Report of the Finance Committee on the subject of proceedings to be taken against certain members of the Society.

The Report was received and read, and consideration ordered to be deferred.

Mr. Murray also presented a Report on the subject of G. M. Gardner's case and the letters of the Solicitor.

Ordered that the Report be referred back to the Finance Committee with instructions to communicate with the Solicitor and to report fully on the whole matter forthwith.

Ordered that in future all matters in which special litigation is suggested be referred to the Discipline Committee for a special report before proceedings are taken.

Ordered that the matters referred to in the Report of the Finance Committee as to proceedings to be taken against certain members, be referred to the Discipline Committee for report.

Tuesday, 5th February.

Convocation met.

Present—Messrs. Bruce, Hoskin, Irving, Kerr, Kingsmill, Mackelcan, Martin, Meredith, Moss, Murray, Osler, and Shepley.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

The letter of 30th January last, addressed by Mr. J. A. Macdonell to Convocation, was considered.

Ordered that it be referred to a Committee composed of Messrs. Hoskin, Irving, Meredith, Moss, Osler, and Robinson, to report to Convocation as to whether there is any rule or usage with reference to a Member of Convocation holding a brief or acting as counsel or solicitor against the Society in proceedings to which it is a party, or in which it is concerned, and to make such recommendations or suggestions with regard to the question as may appear to them to be proper.

Two other letters from Mr. Macdonell, of 4th February, were read, the consideration of which was deferred until the Committee above mentioned have reported.

Ordered that the judgment of the Q. B. Division in the case of Mr. J. B. Hands be appealed and that the Solicitor be instructed to take the necessary steps.

The consideration of the first two paragraphs of the Finance Committee's Report on the Balance Sheet and Estimates was proceeded with and adopted.

Ordered that the Balance Sheets and Estimates be entered upon the journals of Convocation.

Wednesday, 6th February.

Convocation met.

Present—Messrs. Beaty, Bruce, Ferguson, Foy, Hudspeth, Irving, Kerr, Kingsmill, Martin, Moss, Osler, Purdom, Robinson, Shepley.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

Convocation proceeded with the consideration of the resolutions relating to the Law School.

Resolutions and expressions of opinion from London, Simcoe, and the Osgoode Legal and Literary Society, were read.

The consideration of the Report of the Special Committee was then proceeded with and the following resolutions adopted :

That the Principal of the Law School shall be a Barrister who has been called not less than ten years, and that his salary shall be not less than $3,500 a year.—*Carried.*

That there shall be at least two Lecturers who shall each be paid salaries not exceeding $800 for each year.—*Carried.*

That there shall be two Examiners who shall each be paid salaries not exceeding $500 for each year.—*Carried.*

That the Student's fee shall be $20 in advance for each year.

It was then ordered that the further consideration of the Report and the re-organization of the Law School do stand until Friday, 15th February, and that the Secretary do cause to be printed the resolutions relating to the Law School so far as they have been adopted, and that a copy be sent to each member of Convocation with the notices of motion to be made on the further consideration of this matter, as follows :—

NOTICES OF MOTION FOR FRIDAY, 15TH FEBRUARY, 1889.

A.—Mr. Meredith gave notice that he would move :

That where any University of this Province had established a Law Faculty, and provided for a Course of Instruction and Lectures thereat, similar to those adopted at the Law School and to the satisfaction of Convocation, such Law Faculty may be constituted a branch Law School, and it shall be optional with the Students who are required to attend the Law School, to attend the Course of Instruction and Lectures at such branch School, and such University shall be entitled to receive and be paid out of the funds of the Law Society for each Student attending the said course in each and every term during which he attended, the sum of twenty dollars towards defraying the expenses of the University in providing such Course of Instruction and Lectures, the remainder of which shall be borne by the University and such branch Law School may be further aided as Convocation may from time to time determine.

B.—Mr. Meredith gave notice that he would move :

That attendance at the Lectures and other methods of instructions should not be compulsory on Students who are or shall be at the time these resolutions go into effect, under service.

C.—Mr. Moss gave notice that he would move (for discussion only):

That Students should not be required to be under service while attending said School, but that the time they are in attendance should be allowed as part of the three or five years, as the case may be, now required by the Students to be under articles.

D.—Mr. Osler gave notice that he would move, by way of reconsideration :

That the annual fee of twenty dollars to be paid by Students, be reduced to ten dollars for each year, or that when the Student shall have passed his final Examination for Call, the sum of ten dollars in respect of each annual fee of twenty dollars which he shall have paid as fees in attendance at the Law School, shall be credited to him upon his fees then payable.

Saturday, 9th February.

Convocation met.

Present—Messrs. Hoskin, Irving, McCarthy, McMichael, Meredith, Morris, Murray, Osler, Robinson, Shepley.

Mr. Irving was appointed Chairman in the absence of the Treasurer.

The minutes of last meeting were read and approved.

Mr. Hoskin presented the Report of the Special Committee (appointed on the 6th instant) to consider the position of Members of Convocation in proceedings before the Courts in which the Law Society is a party.

The Report was received, ordered for consideration and adopted.

Mr. Osler, from the Special Committee on Honors and Scholarships in connection with the Second Intermediate Examination, reported as follows:—

That Messrs. Anglin, Holden, Denton, Gemmill, and Orde passed the Second Intermediate Examination with Honors, and that A. W. Anglin is entitled to a Scholarship of one hundred dollars, J. B. Holden to a Scholarship of sixty dollars, and J. H. Denton to a Scholarship of forty dollars.

The Report was adopted and ordered accordingly.

Mr. Hoskin drew attention to a resolution of the County of York Law Association, forwarded by Mr. Barwick, the Secretary of the Association, drawing the attention of Convocation to the application of G. M. Gardner to the Legislature for an Act authorizing his admission as a Solicitor.

Ordered that a Committee consisting of Messrs. Irving and Hoskin be appointed to watch the legislation referred to.

Ordered that the Finance Committee report to Convocation the estimated cost of opening the Library at night, except during the long vacation, from 7.30 p.m. to 10.30 p.m.

The resignation of Mr. Osler as a member of the Legal Education Committee was accepted, and Mr. Osler proposed, with the concurrence of the Chairman, Mr. Moss, Mr. Kingsmill as a member of that Committee in his place. —*Carried.*

The Finance Committee was discharged from reporting upon the subject of G. M. Gardner, which was referred to them by Convocation on the 4th inst.

Friday, 15th February.

Convocation met.

Present—The Treasurer and Messrs. Beaty, Britton, Bruce, Cameron, Foy, Guthrie, Hoskin, Irving, Kerr, Kingsmill, Mackelcan, Martin, McMichael, Morris, Moss, Murray, Osler, Purdom, Robinson, Shepley, Smith.

The minutes of last meeting were read and approved.

Mr. Moss presented the Report of the Legal Education Committee.

In the case of George G. Martin, recommending that before his Certificate of Fitness be granted, he be required to produce a certificate of the County Judge or Junior Judge of Kent, and of three senior out of five senior members of the profession practising in Chatham, in the terms of Schedule "B," in lieu of the usual certificate from the late Patrick McGregor.

In the case of A. L. Baird, recommending that he be required to place himself under articles for three months and twenty-four days, and that his examination do stand for favorable consideration after proof of service under such articles.

In the case of W. M. Sutherland, recommending that he be required to place himself under articles for six months and six days, and that his examination do stand for consideration until after proof of such service—it being considered premature to now express any opinion thereon.

The Report was ordered for immediate consideration and adopted.

Mr. Murray, from the Finance Committee, reported, recommending that $20,000 be at once invested in debentures.

Ordered for immediate consideration.

Ordered that $20,000 be invested in Loan Companies' debentures at not less than 4½ per cent. interest.

Mr. Irving, from the Library Improvement Committee, reported as to the arrangement proposed to be made of the books on the new shelving.

The Report was ordered for immediate consideration and adopted, save as to the paragraph number 5. As to it, it was ordered that the Committee have power to remove all but the frame work of the southern alcoves.

The letter of Mr. J. T. C. Holden was read and received.

Ordered that it be referred to the Finance Committee, with power to act after due enquiry.

A letter from Mr. J. A. Macdonell was read and received.

The question of the Law School, ordered to stand for this day, was then taken up.

Mr. Purdom (for Mr. Meredith) moved the resolution of which he had given notice, in the following words:

That where any University of this Province had established a Law Faculty, and provided for a Course of Instruction and Lectures thereat, similar to those adopted at the Law School and to the satisfaction of Convocation, such Law Faculty may be constituted a branch Law School, and it shall be optional with the Students who are required to attend the Law School, to attend the Course of Instruction and Lectures at such branch School, and such University shall be entitled to receive and be paid out of the funds of the Law Society for each Student attending the said course in each and every term during which he attended, the sum of twenty dollars towards defraying the expenses of the University in providing such Course of Instruction and Lectures, the remainder of which shall be borne by the University, and such branch Law School may be further aided as Convocation may from time to time determine.

That attendance at the Lectures and other methods of instructions should not be compulsory on Students who are or shall be at the time these resolutions go into effect, under service.

Mr. Osler moved in amendment to Mr. Purdom's motion:

That where any County Law Association in this Province, except in the County of York, either in conjunction with any University or otherwise, establishes a local Law School and provides for a Course of Instruction and Lectures thereat similar to those adopted at the Law School and to the satisfaction of Convocation, such local School may be constituted a branch Law School and shall be under the supervision of the Principal, who shall, under direction of Convocation, aid by Lectures and otherwise in the Course of Instruction thereat, and it shall be optional with the Students who are required to attend the Law School to attend the Course of Instruction and Lectures at such branch School. The examinations and certificates connected with such branch Law School shall be the same as in the case of those Students and Clerks who attend the Law School at Toronto, and such branch School shall be entitled to receive such financial aid from the Law Society as may be agreed upon between the Law Society and the County Law Associations, but not less than the yearly fees payable by the Students attending such branch School.

Mr. Purdom withdrew his resolution in favor of Mr. Osler's, which became the main motion.—*Lost.*

Mr. Martin moved that the following resolution be substituted for clause 1:

The Law School should be thoroughly re-organized and continued independently of any University, and it is not desirable to shorten in any way the period of study or service of Students,

Mr. Moss, seconded by Mr. Britton, moved in amendment to add the following words:

And that where any University of this Province has established a Law Faculty and provided for a Course of Instruction and Lectures thereat, similar to those adopted at the

Law School and to the satisfaction of Convocation, the attendance of a Student upon one of such Courses of Instruction and Lectures shall be accepted in lieu of attendance upon one of the Courses prescribed in the Law School.

Mr. Meredith, seconded by Dr. Smith, moved in amendment to the amendment,

That all the words in the proposed amendment after the word "Convocation" be struck out, and the following substituted therefor:

The attendance of a Student upon such Course of Instruction and Lectures shall be accepted in lieu of the like attendance upon the course prescribed in the Law School.—*Lost.*

Mr. Moss' amendment was carried.

The main motion was carried as amended.

Mr. Moss moved:

That the actual time Students attend at the Law School count as part of the term of service under articles or under clause 5.—*Carried.*

Mr. Meredith moved that attendance at the Lectures and other methods of instruction should not be compulsory on Students who are or shall be at the time these resolutions go into effect, under service.

Mr. Britton moved in amendment as follows:—

That the Rules to be founded upon these resolutions shall provide in some fair and reasonable way for Students under service at the time the rules come into force.—*Carried.*

Mr. Osler moved by way of reconsideration, that the annual fee of twenty dollars to be paid by Students, as provided by the 12th resolution, be reduced to ten dollars.

Mr. Irving moved in amendment:—

That the fee collected for each Term be returned to the Student when called to the degree of Barrister or admitted as a Solicitor, then to be allowed on account of the fees then payable.

Mr. Meredith moved in amendment to the amendment that no fee be payable by Students.—*Lost.*

The main motion was carried.

Mr. Martin moved that it be referred to a select Committee composed of Messrs. Hoskin, Lash, Osler, Shepley, Kerr and the mover, of whom three shall be a quorum, to frame draft rules to carry out the foregoing resolutions, and that such draft rules be printed and circulated before next Term.—*Carried unanimously.*

Mr. Osler gave notice for the second day of next Term of the following motion:—

That in view of the proposed establishment of a Law School under lines of the resolutions passed, it will be expedient to appoint a Committe to report on the accommodation required, and to report if it is necessary to erect a special building for the School.

Ordered that it be a direction to the Finance Committee to enquire and report whether further accommodation can be provided in Osgoode Hall for the clothing of practitioners in attendance at the Hall.

Convocation adjourned.

Notes on Exchanges and Legal Scrap Book.

AMERICAN MARRIAGE LAW.—There are thirty-eight States in the American Union, and in no two are the laws of marriage and divorce alike. Even as regards the age at which marriage is legal they differ—some fixing the old absurd English limits of fourteen and twelve, while in others the husband must be twenty-one and the wife eighteen. In New Hampshire, Ohio, and Indiana, first cousins may not marry; in Nevada and Washington the same rule exists. The people of Vermont must be credited with peculiar, not to say morbid, tastes, for their Legislature has passed a solemn Act prohibiting a man from marrying his mother-in-law. In France such a statute would throw a charm around the forbidden fruit, on the principle that induced a witty and profane French lady, drinking a glass of deliciously cool water on a hot day, to say, "Oh, if this were only a sin!" In three or four Western States marriage with a Chinaman or a person of Chinese blood is illegal, while corresponding restrictions attach in most of the Southern States to alliance with black blood, even when it is attenuated, as in the veins of an octoroon. In Pennsylvania and Tennessee there is special legislation following in the lines of the "leading case" of Enoch Arden. If a man or woman is deserted, and believes that the deserting wife or husband is dead, he or she may legally marry again, and no prosecution for bigamy can follow; but, oddly enough, the first husband returning may reclaim his wife or let her alone—the same option being extended to a recurrent wife. Mr. H. A. Smith, who has collected these and other curiosities of American law, adds on this point: "Supposing a woman to have a penchant for men with migratory instincts abnormally developed, she might well have as many husbands as the Samaritan, and all of them lawful, without any assistance from Death, and then might, after all, return to her first choice. The family relationships arising in such a case would give fine scope for the ingenuity of the cornerman conundrum-inventor of negro minstrelsy." In addition to diversity in the laws of marriage, there are infinite varieties of divorce. In South Carolina alone is marriage indissoluble. In North Carolina, Kentucky, and Tennessee the law is much the same as in England at the present day. In other States desertion for five, three or in some places for two years, will suffice for a final severance of the matrimonial chain. In Florida a man, or for the matter of that, a woman, must be very careful, for the "mere habit of violent temper" will justify a decree. "Habitual drunkenness," defined in different ways, is in many States a valid plea; and conviction of a serious offence is also sufficient. In Wisconsin and Nebraska, if a husband or wife is for any reason detained for three years in a State prison, the marriage is *ipso facto* dissolved. Failure to support a wife in a proper manner is a cause for divorce in about a dozen States; in California and Dakota "wilful neglect" is enough; in Missouri and Wyoming "vagrancy" is sufficient. In three States if the husband or wife join the Shakers, the other party is free. It will be seen, therefore, that if the Canadians fall captive to the charms of American women, they have large liberty of choice as to the kind of marriage

they would like. An almost endless variety offers itself, from South Carolina, where no divorce is allowed, to West Virginia, where a wife can obtain a dissolution of the contract if she discover that before his marriage her husband's relations to other women were not above reproach. The Canadians themselves know something of these diversities, for the old French law as to marriage still prevails in Lower Canada, while the rest of the Dominion is in the main governed by English laws.—*Daily Telegraph.*

LEGAL EDUCATION IN QUEBEC.—A petition presented by the General Council of the Bar of the Province of Quebec to the legislature of that Province calls forth a warm protest from our contemporary, the *Legal News.* In opposition to a private bill introduced to admit Bachelors of Arts to the study of the law without further examination, the Council says: "The experience of Bar examinations has shown that the university degrees granted in this Province are not always a proof of the qualification of the graduates, especially if one may judge by the degrees granted for legal studies." The petition goes on to say that McGill University grants degrees in arts to all students who complete the course in that faculty, while in the colleges, affiliated to Laval University only a very small number of the students receive degrees, and there are colleges in the Province which have not the right of granting degrees. "It has been found," say the petitioners, "by the experience acquired at Bar examinations, that the classical studies in a great many colleges are not of a sufficiently high degree to allow of their certificates being accepted without further examination; that several sciences which are considered important are greatly neglected in most of the colleges; that the programme and method of examination adopted by the Bar have had the effect of compelling the classical colleges to be more careful with their course of studies, and of compelling the students to follow it more attentively and assiduously." By the profession in Ontario the genesis of this unique production will, we fancy, be explained on one of three suppositions; the colleges and universities of Quebec must give an utterly superficial and useless training; the literary and scientific acquirements demanded of beginners in the study of law must be ridiculously high, higher than in any civilized country in the world; or the General Council of the Bar in that Province is an assembly of egotists unduly elated and inflated with the contemplation of their own importance. The *Legal News* seems to think that ignominious failure would be the fate of the learned members of the General Council of the Bar, if they had to pass the examination for admission which they prescribe for others; "for," says our contemporary, "a school-boy would be covered with disgrace if his composition revealed the faults of grammar which appear in the petition of that august body." It begs them not to make themselves ridiculous by setting up rules which do not exist in any part of the civilized world. No one in Ontario has yet dared to advocate any higher examination in lieu of the "primary" of the Law Society, than matriculation in arts. The day seems to be yet distant when a degree in arts, or an equivalent for it, will be demanded. We wish it was much nearer than it is. But

we think the time will never come when a degree in arts from one of our universities will be rejected as insufficient evidence of knowledge and culture to qualify the applicant for beginning the study of the law. Are the people of Ontario and its professional men inferior in education to those of the sister Province? We certainly think not.

A CONFESSION NOT CONCLUSIVE PROOF OF GUILT.—One of the most remarkable cases in the criminal annals of the present century has lately been disposed of at the Northumberland (England) assizes by Mr. Justice Denman and a jury. The prisoners, Harrison, Gair, and Spratt, were accused of conspiracy and perjury in connection with the Edlingham burglary in 1879. In February of that year two burglars broke into Edlingham Vicarage and wounded the Vicar and his daughter, a crime of which Brannagan and Murphy were convicted in the following April, and sentenced to penal servitude for life. Last year two other men, Edgell and Richardson, came forward and confessed that they were the real culprits. The convicts were pardoned and released, and each of them received a *solatium* of £800 for his nine years in the dungeon. The police were accused of having conspired to convict innocent men, and three of them were indicted, as already mentioned, for conspiracy and perjury. The trial and conviction of Edgell and Richardson upon their own voluntary confession, and their being sentenced to four years' penal servitude, convinced the public that there had been a great miscarriage of justice in the former trial. The weight given to their evidence by reason of the severe punishment to which they were of their own accord exposing themselves, was somewhat detracted from by their admission on cross-examination that they had been assured that as there were two men in prison already for the same crime, they could not be punished if they confessed. At the recent trial all the facts of the original crime were fully gone into, and Mr. Justice Denman declares that there was "a tremendous case" against the original prisoners, nothwithstanding that they had the services of able counsel. The evidence given against them was in some points slightly weakened, but in others it was materially strengthened. Brannagan was identified by the Vicar and his daughter as one of the burglars, and the latter says positively that Edgell was not the man. But the confession and imprisonment of the other two men remains a stubborn fact to be explained. The trial of the police has satisfactorily established one thing, that they did nothing more than their duty in working up the case in 1879. Mr. Justice Denman does not seem to have shared in the general doubt as to which pair of villains, for all of them were admittedly men of depraved character, committed the crime. He says that if Brannagan and Murphy could be tried again, the evidence against them would be ten times stronger than it was ten years ago, and no jury could have had any hesitation in convicting them at that time. The verdict of the jury at the trial of the police for conspiracy was "not guilty," of which Mr. Justice Denman remarked, "a very right verdict, gentlemen, if you will allow me to say so."

DIARY FOR APRIL.

1. Mon ....County Court Sittings for Motions begin.
2. Tue ....County Court Non-Jury Sittings, except in York.
6. Sat.....County Court Sittings for Motions end.
7. Sun ....*5th Sunday in Lent. Passion Sunday.*
14. Sun ....*6th Sunday in Lent. Palm Sunday.*
15. Mon ....County Court Non-Jury Sittings in York.
19. Fri.....Good Friday.
20. Sat.....Last day for Primary Notices.
21. Sun ....*Easter Sunday.*
22. Mon ....Easter Monday.
23. Tue ....St. George's Day.
25. Thu ....St. Mark.
28. Sun ....*1st Sunday after Easter. Low Sunday.*
30. Tue ....Primary Examination.

Reports.

ONTARIO.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Reported for THE CANADA LAW JOURNAL.

GRAHAM *v.* DEVLIN.

Receiver—Share under will—Precatory trust.

This was a motion to continue the Sheriff of Toronto as receiver of the defendant's share in the estate of his father, under the will of the latter, which devised and bequeathed the testator's realty and personalty to his wife, and expressed a wish that she should divide the estate amongst their children, of whom the defendant was one, before her death.

Held, that the motion was practically one to construe a will, which could not be done on motion.

Held, also, that it was not shown that there was any estate that could be received.

[FERGUSON, J. March 12.

Motion by the plaintiff, who had obtained judgment against the defendant, for an order continuing the Sheriff of Toronto as receiver of the share of the defendant in the estate of his father, under his will.

The clause of the will under which it was claimed the defendant took an interest was as follows :—"I give, devise and bequeath to my beloved wife Eleanor Devlin all my ready money and securities for moneys that I may die possessed of, for her sole use and benefit, and it is my will and wish that my wife Eleanor Devlin shall divide the real estate and money and securities for money amongst our surviving children before her death."

The material filed by the plaintiff showed that he had obtained judgment for $1,525.40 debt and $222.66 costs against the defendant, and had placed writs of fi. fa. in the sheriff's hands, which were unsatisfied; that the defendant had been examined as a judgment debtor and had deposed that he was unable to satisfy the judgment and had no property. The plaintiff swore that the only way he had of realizing his judgment was by the appointment of a receiver to receive the share of the defendant under the will of his father William Devlin.

It also appeared that the defendant was one of seven children of William and Eleanor Devlin, whose estate amounted to $5,000 or $6,000, and that the defendant had received no part of the estate.

J. M. Clark, for the plaintiffs, referred to *Le Marchant* v. *Le Marchant*, L. R. 18 Eq. 214; *Re Hutchings*, W. N. 1887, p. 217; Lewin on Trusts, 8th ed., pp. 130, 387.

C. J. Holman, for Eleanor Devlin, referred to *Re Diggles*, 29 Ch. D. 253; *Re Adams*, 27 Ch. D. 398; Jarman on Wills (4th Eng. ed.), p. 396; *Missouri Bank* v. *Raynor*, 7 App. Cas. 321; *Lamb* v. *Eames*, L. R. 10 Eq. 267.

No one appeared for the defendant or the executors of his father, though duly notified.

FERGUSON, J.—This application asks more than any application hitherto. I am really asked to construe a will in a way that at present does not seem to me to be the meaning of it, to make out that the defendant has even a prospective estate of any value whatever. The will cannot be construed upon a motion of this kind at all, I think. The application, in my opinion, fails, for the reason that it is not shown that there is any estate that might or could be received, and the court will not appoint a receiver in a case where it cannot be perceived or it does not appear that any good purpose will be served by so doing. See *Smith* v. *Port Dover, etc., Railway Co.*, in appeal, 12 A. R. 288, and my judgment there, 8 O. R. 256, referring to the case of the late Chief Justice Spragge.

Motion refused. *With costs.*

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

SMITH *v.* MILLIONS.

Survey—Plan part of description in deed.

The decision of the Court below (reported 15 O.R. 453) was reversed with costs, this Court being of opinion that having regard to the plan itself the lots must be laid out in rectangular, and not in rhomboidal, shape.

McVeity, for the appellant.

Lash, Q.C., for the respondent.

MCLEAN *v.* BROWN.

Sale of goods—Material condition in contract—Refusal to accept—Action for deposit and damages.

This Court being equally divided in opinion, an appeal from the judgment of the Divisional Court of the Chancery Division (reported 15 O.R. 313) was dismissed with costs.

Per HAGARTY, C.J.O., and OSLER, J.A.—The stipulation as to consignment was a condition the breach of which justified the refusal to accept the lambs.

Per BURTON and MACLENNAN, JJ.A.—This stipulation was merely collateral to the contract.

Osler, Q.C., for the appellant.

Aylesworth, for the respondent.

Re MCDONAGH AND JEPHSON.

Creditors' Relief Act—Executions against firm and against individual partners—Sale of firm property—Mode of distribution of proceeds.

The Creditors' Relief Act is merely intended to abolish priority among execution creditors of the same class, and to alter the legal effect of the executions themselves or to effect a distribution of separate and partnership assets in the manner in which such assets are administered in bankruptcy.

There were in the sheriff's executions (1) against R. alone; (2) against R., J. J. and G. J. on a joint note given by them for the price of a horse, J. J. being merely a surety for R. and G. J., who bought the horse as partners and held it as partnership property; (3) against G. J. and R. on a joint note given by them for the price of a threshing machine purchased for the purpose of being used in another partnership business carried on by them quite distinct from that partnership business to which the horse belonged; and (4) against G. J. and R. on a joint note in which R. was surety only for G. J. The horse was seized and sold.

Held, reversing the decision of the County Court of the County of Huron, that the proceeds of this sale were distributable rateably among the execution creditors (2) and (3).

Moss, Q.C., and *Chisholm*, for the appellants.

S. H. Blake, Q.C., for the respondents.

BARTRAM *v.* HILL.

Sale of goods—Contract induced by false pretences—Purchaser for value without notice.

The plaintiff exchanged with one H. a horse belonging to the plaintiff for a mare supposed to belong to H., and gave H. $10 "to boot." As a matter of fact the mare had been stolen by H., and her owner subsequently reclaimed her. H. sold the horse to the defendant, who had no knowledge of the fraud. H. had not been prosecuted under R.S.C., cap. 174, s. 250.

Held, affirming the judgment of the County Court of the County of Brant, that the plaintiff having intended to part absolutely with his property in the horse to H., and the defendant having purchased the horse in good faith, the fact that the transfer to H. was made by way of barter and exchange, and not by way of sale, did not affect the matter, and the plaintiff could not recover.

Bentley v. *Vilmont*, 12 App. Cas. 471, considered.

MacKenzie, Q.C., for the appellant.

Aylesworth, for the respondent.

GOLDIE *v.* JOHNS.

Tax sale—Replevin—Sale of safe held under lien agreement—R.S.O., c. 184, s. 364—R.S.O., c. 195, ss. 122, 123, 124.

In December, 1886, the defendants sold to one H., who was a tenant to the defendant

G. of certain premises in the City of Stratford, a safe under the ordinary lien agreement, the purchase money being payable in two instalments at six and twelve months. Under the lease H. was to pay taxes. In October, 1887, after the first instalment of purchase money had been paid, H. surrendered his lease to G., who took over the chattels of H. (including the safe) at a valuation, and assumed payment of the proportion up to that time of the taxes for 1887. G. then leased the premises to the defendant P. and sold him the chattels, including the safe.

The defendant J. was collector of taxes for the City of Stratford, and the roll for 1887 was delivered to him on the 26th October, 1887.

It is provided by by-laws of the City that all taxes and assessments shall be paid by the 31st December in each year, and that 5 per centum shall be added for non-payment and collected as if the same had originally been imposed and formed part of such unpaid tax or assessment.

On the 2nd November, 1887, J. served a notice on P. showing the amount of taxes and requiring payment of these taxes on or before the 31st December, "according to City by-law; after that date 5 per cent. on the dollar will be added to the above amount."

On the 9th March, 1888, the defendant J. issued his warrant to the defendant T. to distrain, and the safe was seized and sold on the 15th March to the defendant G. Five per cent. was added to the amount of the taxes, but no demand was made after the 31st December for payment.

On the 9th March the safe was demanded by the plaintiffs.

Held, that the sale (upon the evidence) was not made in good faith and was void.

Held, also, affirming the decision of the County Court of the County of Perth, that the sale was bad, no demand being made after the time fixed for payment.

Idington, Q.C., for the appellants.

Aylesworth, for the respondents.

MAY *v.* REID.

Prosecution under R.S.C., c. 8, s. 3—Costs as against prosecutor.

The plaintiffs were tried at the Haldimand Assizes in the spring of 1887 for bribery and acquitted. The information upon which the indictment was founded was laid against them by the defendant, and at the conclusion of the trial the presiding judge, at the request of the counsel for the plaintiffs, endorsed on the indictment the statement that it was proved that the defendant was the private prosecutor. The plaintiffs taxed their costs of the prosecution and brought this action to recover payment of these costs from the defendants. The information and the indictment with the endorsement were the only evidence that the defendant was a private prosecutor.

Held, that the endorsement on the indictment had no force as a judgment or finding of fact, and could not be accepted as proof of the defendant's position.

Held, also, that the fact that the information was laid by the defendant did not in itself place him in the position of private prosecutor.

Decision of the County Court of the County of Lincoln reversed.

Aylesworth, for the appellant.

Lash, Q.C., for the respondents.

Re CLARK AND THE UNION FIRE INSURANCE COMPANY.

Dominion Winding-up Act—Constitutionality—Application of Act to provincial corporation.

Held, affirming the decision of BOYD, C. (reported 14 O.R. 618), that the Act 45 Vict., c. 23, now R.S.C., c. 129, is *intra vires* the Dominion Parliament, and applies to an insurance company incorporated by the Provincial Legislature.

Held, also, BURTON, J.A., dissenting, that the order having been made and the liquidator appointed by the Judge, the subsequent proceedings might properly be referred to the Master.

Lash, Q.C., for the appellants.

Bain, Q.C., for the respondents.

THOMPSON *v.* ROBINSON.

Solicitor and client—Negligence by solicitor—Liability of partners.

R., a solicitor practising in Chatham, was employed in 1877 by the plaintiff to manage

her business affairs, and he proceeded to invest the plaintiff's moneys upon mortgages. In 1878 he took the defendant W. into partnership with him, and the business of the plaintiff continued to be managed by him, but all entries were made in the books of the firm, and all legal charges went into the profits of the firm. Losses occurred in connection with these investments.

Held, BURTON, J.A., dissenting, affirming the decision of the Divisional Court of the Queen's Bench Division (15 O.R. 662), that W. was liable. When the partnership was formed, W., in order to escape liability, should have given warning to the plaintiff that he did not intend to accept liability.

In 1883, R. entered into an agreement with the plaintiff to purchase for her certain lands in Dakota, R. being entitled to a certain share of the profits of the speculation. The moneys were lost.

Held, reversing the decision of the Divisional Court of the Queen's Bench Division, that the transaction was not entered into by R. as a collector, and that W. was not liable for the loss.

Moss, Q.C., for the appellant W.

Osler, Q.C., *Douglas*, Q.C., and *Aytoun-Finlay*, for the respondent T.

M. Wilson, for the respondents, the trustees of R.

POTTS *v.* BOIVINE.

Will—Cujus est solum ejus est usque ad coelum.

A testatrix, being the owner of certain lands and premises in the City of Belleville upon which a block of buildings were erected, devised the property in two parcels. The description of one parcel included an archway running through the centre of the block, but the rooms built over this archway were used with the premises devised as the other parcel.

Held, affirming the decision of the Divisional Court of the Common Pleas Division (16 O.R. 152), that the presumption *cujus est solum ejus est usque ad coelum* is a rebuttable one, and that, under the circumstances, the rooms in question did not pass with the land.

Dickson, Q.C., and *Burdett*, for the appellant.

Northrup, for the respondent.

ROWLANDS *v.* THE CANADA SOUTHERN RAILWAY COMPANY.

Negligence — Railways — Workmen's Compensation for Injury Act—R.S.O., c. 141.

An engine driver is a person who has charge or control of a locomotive or engine within the meaning of R.S.O., c. 141, s. 3, s.s. 5, and the plaintiff, a brakesman, who was injured in consequence of the cars being brought together without any warning signal from the engine, was held entitled to recover.

A. J. Cattanach, for the appellants.

R. M. Meredith, for the respondent.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Div'l Ct.] [Feb. 4.

CURRY *v.* CANADIAN PACIFIC RY. CO.

Railway Company—Negligence—Invitation to passenger to board moving train — Patent danger—Question for jury—New trial.

The plaintiff, who was a passenger on a train of the defendants, alighted at a station, and the train having started before he had re-entered it, endeavored to jump on while it was in motion. In doing so he was injured, and brought this action for damages for negligence. There was evidence of an invitation by the conductor of the train to jump on while it was in motion, and the jury found (1) that there was such invitation; they also found (2) that the plaintiff used a reasonable degree of care in endeavoring to get on; and (3) that he was injured while trying to get on, in pursuance of the request of the conductor.

It was argued by the defendants that the danger to the plaintiff was so patent and obvious that he had no right to act on the conductor's invitation or to attempt to get on the train.

Held, that this was a matter which should have been submitted to the jury, and that it was not covered by the second finding; that the questions involved in the action could not be determined upon the findings, and that there should be a new trial.

Per ARMOUR, C.J.—Questions for the jury suggested.

J. W. Elliott, for the plaintiff.

G. T. Blackstock, for the defendants.

STREET, J.] [Feb. 19.

CHAPLIN *v.* PUBLIC SCHOOL BOARD OF TOWN OF WOODSTOCK.

Public schools—Seats of trustees—Contracts with school board—R.S.O., c. 225, s. 247, construction of—Declaring seats vacant—Powers of remaining trustees—Powers of court—Injunction—Quo warranto—Parties.

In an action brought by a ratepayer against a School Board, three of the persons elected as trustees, and one G., the statement of claim alleged that the three defendant trustees had, by reason of their being interested in certain contracts with the Board, *ipso facto* vacated their seats, by virtue of s. 247 of the Public Schools Act, R.S.O., c. 225; that they nevertheless continued to sit and vote, and had voted in favor of certain resolutions which were passed whereby the principal of the schools was dismissed, and the defendant G. appointed in his place; and that but for the votes of the three defendant trustees the result would have been different. The prayer was that the seats of the three should be declared vacant and the votes and resolution declared void, and for an injunction restraining the defendants, the trustees, from further acting as members of the Board.

Held, upon demurrer, following *Hardwick v. Brown*, L.R. 8, C.P. 406, that the seat of a trustee does not under s. 247 actually become vacant until the other members of the Board have declared it to have become vacant; and in this case, no action having been taken by the remaining members of the Board, that the seats of the three defendant trustees were full, and being full, that the Court would not interfere by injunction to restrain the occupants of them from acting as trustees.

2. That *quo warranto* proceedings were the only means by which the seats could be declared vacant by the Court; that the duty of declaring them vacant, if the facts charged were established, devolved upon the remaining individual members of the Board, who were not parties to the action and were not made parties by the fact that the school corporation was a party defendant.

Rex. v. *Mayor of Hartford*, 2 Salk 701; *Rex.* v. *Smith*, 2 M. & S. 598, referred to.

3. That the defendant G. was an unnecessary and improper party to the action.

W. Nesbitt, for demurrer.

C. J. Holman, contra.

STREET, J.] [March 2.

YOUNG *v.* MIDLAND RY. CO.

Railways—Compensation for land taken—Conveyance in fee by tenant for life—C.S.C., c. 66, s. 2—24 Vict., c. 17, s. 1—Estates in compensation money—Statute of limitations—Will—Devise of land taken for railway—Inoperative to pass compensation—Parties.

Under the Railway Act, C.S.C., c. 66, s. 2, s.s. 1, as interpreted and explained by 24 Vict., c, 17. s. 1, a tenant for life had power to convey the fee to a railway company, but had no power to receive the purchase money, and therefore a railway company which took a conveyance in fee from a tenant for life and paid her the purchase money remained responsible for the payment. The meaning of s.s. 22 of s. 2 is that the money value of the land is converted into a piece of real estate, which the railway company holds for the owners of the land in place of which it stands, and that the estates in the land existing at the time the land is taken become estates in the compensation instead; and upon the tenant for life, in this case, conveying the fee, she became tenant for life in the compensation, and those entitled to the inheritance in the land became entitled to the reversion in fee in the compensation as against the railway company, and the Statute of Limitations did not begin to run against them till the death of the tenant for life.

The tenant for life conveyed to the railway company in 1871. The person entitled to the reversion after the life estate died in 1871 intestate, and I. H. Y., his sole heiress-at-law, died in 1884, leaving a will in which she devised to the plaintiff a specific parcel of land, including the part conveyed to the railway company.

Held, that this will did not pass to the

plaintiff the right to receive the compensation money, and that as to it I. H. Y. died intestate, and it descended to her heirs-at-law, of whom the plaintiff was one, and the plaintiff was allowed to amend by adding the other heirs-at-law as parties.

J. K. Kerr, Q.C., and *Wm. Macdonald*, for plaintiff.

Osler, Q.C., for defendants.

STREET, J.] [March 11.

In re COLLARD AND DUCKWORTH.

Will—Devise for life—Power of appointment—Exercise of power—Covenant not to revoke will—Title to land—R.S.O., c. 100, s. 19.

M. D. by her will devised certain land to trustees upon trust to hold one part to the use of her son, C. S. C., for his life, and after his decease to convey the same to his children, or to such of the testatrix's other three sons or their children as C. S. C. might by his last will appoint; and the other part to the use of her son, W.D., in precisely the same way.

C. S. C. and W. D. each appointed his parcel to the other by will duly executed, and each conveyed to the other his life interest, and covenanted in the conveyance not to revoke the appointment made by the will. They then contracted to sell both parcels to a purchaser.

Held, that C. S. C. and W. D. each took under the will a life estate with a power to appoint the inheritance in fee by will amongst the specified objects, and that such a power cannot be executed except by will, the intention being that the donee of the power shall not deprive himself until the time of his death of his right to select such of the objects of the power as he may deem proper; and notwithstanding the covenants here given not to revoke the appointments, a subsequent appointment by will to one of the other objects of the power would be a good execution of it, and the covenants would not affect the title of the subsequent appointee, for he would take the estate under the original testatrix, and not under the devisee for life.

Held, also, that the position of C. S. C. and W. D. was not aided by s. 19 of R.S.O., c. 100, which gives to the donee of a power the right to release or to contract, not to exercise it; by so doing they could not confer upon themselves the right to give the purchaser a good title.

Upon a petition under the Vendor and Purchaser Act, it was therefore declared that C. S. C. and W. D. could not make a good title.

D. Urquhart and *E. J. B. Duncan*, for the petitioners.

McCrimmon, for the purchaser.

STREET, J.] [March 11.

MCINTOSH *v.* ROGERS.

Vendor and purchaser — Contract — Interest — Taxes.

Motion for supplemental judgment on further directions upon questions as to interest and taxes in an action for specific performance of contract for purchase of land by defendant.

By the terms of the contract (see 14 O.R. 97) the existing mortgage was to be assumed by the purchaser, and the balance of the purchase money was payable "on completion and tendering a conveyance."

Held, that this meant that the purchaser should assume the mortgage from the time when the purchase money became payable. The tendering of the conveyance meant the offer to the purchaser of a properly executed conveyance at a time when the vendor deemed the purchaser bound to accept the conveyance and the title, and to pay over the purchase money; and the vendor having done this before action, and the purchaser having refused to accept the conveyance or pay his purchase money at that time, on the ground that the vendor could not then make a good title, and the purchaser's position having been sustained, and no subsequent offer of the conveyance having been made, the purchaser was not obliged to accept possession until the whole matter was closed, because he would then from the time of possession become liable to pay interest contrary to the obligations of his contract.

That as soon as the litigation should reach such a stage as to enable the parties to ascertain exactly the balance due from the purchaser, he should at once assume the mortgage, pay the balance, and accept the conveyance, and until that period arrived he was not bound to pay any interest nor to become liable to pay any taxes.

That the vendor was not liable to pay interest upon the deposit.

Hoyles, for plaintiff.

G. W. Marsh, for defendant.

Practice.

Ct. of Appeal.] [March 5.

LIVERNOIS *v.* BAILEY.

Costs, scale of—Setting off costs—R.S.O. (1877), *c.* 50, *s.* 347, *s.s.* 3—*Rule* 428, *O.J.A.*, 1881.

An appeal from the decision of the C.P.D., 12 P.R. 535, was dismissed, the members of this Court being divided in opinion.

Held, per HAGARTY, C.J.O., and BURTON, J.A., that the trial judge had the power to deal with the costs, and that power, having been exercised, was not reviewable, and the appeal should be allowed.

Per OSLER and MACLENNAN, JJ.A., that the appeal should be dismissed.

J. W. Nesbitt, for the appellant.

H. H. Collier, for the respondent.

Ct. of Appeal.] [March 5th.

In re CITIZENS' INSURANCE COMPANY AND HENDERSON.

Arbitration and award—Reference back to arbitrators—Time for moving—Delay—Discovery of new evidence—Fraud—Scope of reference back.

An application to remit a case back to arbitrators for reconsideration need not be made within the time limited for moving to set aside an award, but it must be made within a reasonable time, and the delay must be satisfactorily accounted for.

Leicester v. *Grazebrook*, 40 L.T.N.S. 883 approved and followed.

In this case a reference of the claims upon certain insurance policies was made by submission to two arbitrators, who disagreed, and in pursuance of the submission chose an umpire, who made his award on the 25th July, 1887. On the 29th May, 1888, the insurers moved for a reference on the ground that they had then recently discovered evidence that a quantity of goods saved from the fire were not credited by the assured on their proofs of loss and were fraudulently concealed.

Held, that there should be a reference back to the arbitrators to consider the new evidence and determine its bearing on the questions originally submitted to them. The reference back should be general, and not limited to an inquiry as to what goods were not destroyed by fire.

Bain, Q.C., and *Kappèle*, for the appellants.

Aylesworth and *Hellmuth*, for the respondents.

STREET, J.] [March 11.

REGINA *ex rel.* DOUGHERTY *v.* MCCLAY

Municipal elections—Quo warranto—Powers of County Judge—R.S.O., c. 184, *ss.* 187-208—*Rules* 41, 1038—*Motion to set aside proceedings.*

Notwithstanding the provisions of R.S.O., c. 184, ss. 187-208, a County Judge has now no authority, as such, to give leave under Rule 1038 to serve a notice of motion to initiate *quo warranto* proceedings under the Municipal Act; and he has no authority at all to act in proceedings of that nature as a local judge of the High Court, that power being expressly excepted from the powers conferred upon him as a local judge by Rule 41.

A County Judge assumed to act in such proceedings, which were styled in the High Court of Justice.

Held, that he must be taken to have acted in his capacity as local judge of the High Court, and objection to the proceedings was properly taken by motion to set them aside.

W. R. Meredith, for the respondent.

Aylesworth, for the relator.

FERGUSON, J.] March 11.]

IMPERIAL LOAN CO. *v.* BABY.

Judge in Chambers—Motion to extend time for moving Divisional Court.

A motion to extend the time for moving before a Divisional Court against the judgment of the trial judge should not be made to a judge in Chambers, but to the Divisional Court itself.

Hoyles, for defendant.

E. B. Brown, for plaintiffs.

MR. DALTON.] [March 11.

TRADERS' BANK *v.* KEAN.

Evidence—Examination—Motion to be made—Rule 578.

Immediately after appearance in the action a subpœna was issued and an appointment given for the examination of the defendant, and also of one M. D. Kean (not a party), before a special examiner at Barrie, to give evidence on behalf of the plaintiffs on a motion to be made by them under the rules respecting replevin for an order for replevying a certain guarantee, the subject of this action.

The subpœna and appointment were moved against on the ground that there was no motion, petition, or other proceeding pending in the action, and the provisions of Rule 578 were therefore not applicable.

Held, that there must be a pending motion on which the examination is to be taken; and such was not the case here, as the subpœna spoke of a "motion to be made."

McMurray v. *Grand Trunk Ry. Co.*, 3 Ch. Chamb. R. 130; *Stovel* v. *Coles*, *ib.* 362, referred to.

Held, also, that the examination of the defendant at this stage was improper for another reason; the examination was manifestly on the merits of the action, and it was too early in the action for the plaintiffs to obtain discovery except by a special order under Rule 566.

Lefroy, for plaintiffs.

H. W. Eddis, for defendants.

ROSE, J.] [March 18.

DELANEY *v.* MACLENNAN.

Security for costs—Nominal plaintiff.

The defendant in an action of ejectment, in which the plaintiff claimed title as owner subject to a mortgage to a bank, moved for security for costs on the ground that the plaintiff was not able to pay costs, and that the action was not really brought by him, but by the bank.

It was shown that the plaintiff was financially worthless; that his interest in the land was so doubtful that he did not feel sufficient interest in the question to litigate it; that the bank instructed their own solicitor to look into the title, took the advice of counsel, and were advised to have an action brought in the name of the mortgagor, who was then for the first time consulted about bringing the action; that the ordinary solicitor of the bank was retained to bring the action, and that he admitted he knew the plaintiff was insolvent. It was fairly deducible from the evidence that the bank had really in fact retained the solicitor, and that the solicitor would look to the bank for his costs.

Held, that under these circumstances the action must be regarded as that of the bank, and not of the plaintiff, who was therefore required to give security for costs.

Parker v. *Great Western Ry. Co.*, 9 C.B. 766, and *Andrews* v. *Marris*, 7 Dowl. 712, followed.

W. H. P. Clement, for plaintiff.

J. B. Clarke, for defendant.

Appointments to Office.

REGISTRAR OF DEEDS.

Halton.

D. Campbell, of Nelson, to be Registrar of Deeds for the County of Halton, *vice* F. Barclay, deceased.

CORONER.

York.

Geo. W. Clendenan, M.D., of West Toronto Junction, to be an Associate Coroner for the County of York.

DIVISION COURT CLERKS.

Hastings.

A. W. Coe, of Madoc, to be Clerk of the Sixth Division Court of the County of Hastings, *vice* Dr. Loomis, deceased.

Victoria.

Edward D. Hands, of Fenelon Falls, to be Clerk of the Second Division Court of the County of Victoria, *vice* Geo. Cunningham, resigned.

Peter McIntyre, of Woodville, to be Clerk of the First Division Court of the County of Victoria, *vice* John Gunn, resigned.

BAILIFFS.

Dundas, Stormont and Glengarry.

Homer Stiles, of Cornwall, to be Bailiff of the Third Division Court of the united Counties of Dundas, Stormont and Glengarry.

Simcoe.

Wm. H. McDougall, of Alliston, to be Bailiff of the Eighth Division Court of the County of Simcoe, *vice* F. M. Woodcock.

Victoria.

Angus McKinnon, of Woodville, to be Bailiff of the First Division Court of the County of Victoria, *vice* G. I. Smith, resigned.

Miscellaneous.

OSGOODE HALL LIBRARY.

Latest additions :

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Bellow's Land Surveying, Ann Arbor, 1887.
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——Supplement to above, New York, 1888.
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——Trusts and Partnerships, London, 1885.
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The Canada Law Journal.

VOL. XXV. APRIL 16, 1889. NO. 7.

A SPECIAL sitting of the Divisional Court of the Chancery Division has been appointed to be held in the month of June, commencing on the 10th of that month.

HEREAFTER, in the Chancery Division, all appeals from Reports may be set down for hearing in Court on Thursdays, and appeals from Orders will continue to be set down for hearing on Monday in Chambers.

IN *Fox* v. *The Hamilton Provident and Land Society and Seabra Beaman*, it appeared that the defendant Society had obtained a judgment and execution against the present plaintiff Fox, and the defendant Beaman, for a debt which was owing by the plaintiff Fox to the Society, and for which the defendant Beaman was surety. The defendant Beaman, on judgment and execution being obtained against him and the plaintiff Fox, paid the amount of the claim to the Society and took an assignment, and then proceeded to enforce the execution against the defendant Fox. This action was brought by the plaintiff Fox, who alleged that before the assignment to the defendant Beaman, he had made an arrangement with the Society whereby the Society agreed to extend the time for payment, and he claimed damages and an injunction against the defendants for proceeding under execution. Statement of claim was delivered to the two defendants. The defendant Beaman put in his defence in the ordinary course, but no defence was ever filed by the Society. The plaintiff discontinued wholly against the Society whereupon the defendant Beaman moved to set aside the discontinuance. In support of the motion, it was contended that under Consolidated Rule 641, the plaintiff could not discontinue against one defendant without the leave of a Court or a Judge: *Carlisle* v. *Belfast*, 10 L.R. 36 (Ireland C.L.S.). The Master in Chambers set aside the notice of discontinuance upon the ground that the plaintiff was not entitled under the practice to discontinue against one defendant without leave, and ordered the plaintiff to pay the cost of the application in any event.

IN *Reg. ex rel Stonehouse* v. *Hill*, an appeal was made to the Master in Chambers by the relator under Con. Rule 854, pending the taxation of costs by

one of the taxing officers at Toronto. The question was as to the scale upon which the costs of the successful relator of a *quo warranto* proceeding respecting a controverted municipal election were to be taxed. The respondent contended that the old tariff of Michaelmas Term, 35 Vict., still applied to such proceedings, The relator contended that the old tariff had been superseded, and, the *quo warranto* proceeding having been instituted in the High Court, that the costs must be on the scale of that court. Sec. 208 of the Municipal Act, R.S.O., ch. 184, provides, *inter alia*, that the Judges of the High Court may by rules regulate the practice respecting costs of such proceedings; and that all existing rules shall remain in force until rescinded. By Con. Rule 1,217, the table of costs set forth in the tariff A appended to the rules, shall be that according to which all costs in civil actions in the High Court shall be taxed. By Con. Rule 4 the interpretation clauses of the Judicature Act shall apply to these rules. By sub-sec. 3 of sec. 2 of the Judicature Act, R.S.O., chap. 44, "action" shall include suit, and shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court. Con. Rules 1,038 to 1,044 prescribe the manner of commencing and carrying on *quo warranto* proceedings in respect of controverted municipal elections. The Masters in Chambers held that this proceeding was an action within the meaning of the rules, and that the costs should be taxed according to tariff A, that is, the tariff of costs in actions in the High Court.

SIR WILLIAM BUELL RICHARDS.

THE death of Sir William Richards on the 26th January last, removed from amongst us a man whose eminent public services had established for himself a lasting claim to public regard. He was emphatically a man of the people, gifted with strong common sense and firmness of purpose, and endowed with a virile intellect. It is not surprising, therefore, that such a man, in a country such as this had no difficulty in attaining on his merits a commanding position in the public service of his country. He was descended from an United Empire Loyalist stock of English origin, his father being a man of remarkable natural ability and force of character, and well known in Brockville, where he exerted considerable political influence.

Sir William Richards was born in 1814, and had attained the ripe old age of seventy-four at the time of his death. He studied law at Brockville under, we believe, the late Mr. Justice Sherwood, and in 1837 was called to the Bar, and commenced the practice of his profession in his native town, where he speedily attained considerable distinction as an advocate. Eleven years later we find him a candidate for parliamentary honors, and succeeding in carrying the County of Leeds in the Reform interest by a majority of sixty votes, against the then Grand Master of the Orange Society, the late Ogle R. Gowan. In 1849

he was elected a Bencher of the Law Society. He was, from the outset of his parliamentary career, a supporter of the late Hon. Robert Baldwin, for whom and whose political principles he always maintained the greatest respect. In the Hincks-Morin administration, which was formed on the retirement of Mr. Baldwin from public life in 1851, Mr. Richards held the office of Attorney-General for Upper Canada until the 22nd June, 1853, when, at the comparatively early age of thirty-nine, he was appointed to a puisne judgeship in the Court of Common Pleas in the place of the Hon. R. B. Sullivan, deceased. This office he held until 1863, when he was advanced to the Chief Justiceship in succession to Chief Justice Draper, who had been transferred to the Queen's Bench. After five-and-a-half years' tenure of this office, on the 12th November, 1868, he was appointed to the Chief Justiceship of the Queen's Bench, in which post he was also the successor of Chief Justice Draper, who had been created Chief Justice of the Court of Appeal. He remained at the head of the Queen's Bench until 8th October, 1875, when, on the establishment of the Supreme Court of Canada, his recognized ability as the head of the judiciary of the Province of Ontario led to his being chosen to fill the important and responsible position of Chief Justice of that Court. Shortly afterwards, in 1877, in recognition of his long and distinguished judicial career, he received the honor of knighthood. He had been Chief Justice of the Supreme Court little over three years, when his health, which had been seriously affected for many years past by repeated attacks of asthma, became so undermined that he found it impossible to continue in the discharge of his onerous duties, and in January, 1879, he resigned his position, after a service of a quarter of a century upon the Bench, and sought in the retirement of private life a well earned rest from his labors. After his withdrawal from the Bench Sir William Richards took no part whatever in public affairs.

He died at Ottawa, surrounded by his children—his wife, a daughter of Mr. John Muirhead, of Brantford, having pre-deceased him many years.

Sir William Richards was remarkable for the simplicity of his manners and the entire absence of ostentation. He was singularly frank and courteous to all who practised before him and though at times he was prone to be a little brusque in his manners, his brusqueness was always good-natured and never gave offence. He had no love for technicalities, and was always prone to ignore rather than give effect to them. His judgments were remarkable for vigorous thought, devoid of all attempts at rhetorical flourishes, and went straight to the pith and marrow of the case. His broad mental grasp of the cases submitted to his judgment, coupled with his well known honesty of purpose and mastery of the principles of law, gave both to suitors and the profession an almost unlimited confidence in his decisions, which few other judges have been so fortunate as to secure. As an instance of the forcible, though somewhat homely, character of his wit, it may be remembered that on one occasion he is said to have gravely inquired of a learned counsel, who had been strenuously arguing before him in support of a certain proposition, and then almost in the very next case had, owing to the exigencies of his brief, been constrained to argue dead against what

he had a moment before been contending: "Mr. ——, did you ever try to chew sawdust and whistle at the same time?"

He was, both as a judge and as a man, a Canadian of whom Canadians may well be proud, and will be remembered in our history as one of the giants of his time.

COMMENTS ON CURRENT ENGLISH DECISIONS.

COMPANY—BANK—POWER OF MEETINGS—PENSION—DECEASED OFFICER.

The short point determined by North J., in *Henderson* v. *Bank of Australasia*, 40 Chy. D. 170, was simply this, that a resolution by a general meeting of proprietors of a bank authorizing the directors to pay a half yearly pension for five years for the benefit of the family of a deceased officer of the bank, was *intra vires* of the company, and could not be interfered with at the instance of any objecting proprietor; adopting the reasoning of Bowen, L.J., in *Hampson* v. *Price's Patent Candle Co.* 45 L.J. Chy. 437, he came to the conclusion that in such cases the payments must not only be *bona fide*, but must also be such as are reasonably incident to the business of the company,—in short that "the law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company."

MORTGAGE—PRIORITY—NEGLIGENCE — OMISSION TO OBTAIN TITLE-DEEDS — POSTPONEMENT OF FIRST EQUITABLE MORTGAGE TO SECOND.

Farrand v. *Yorkshire Banking Co.*, 40 Chy. D. 182, is a case which emphasizes the difference which exists in law as to the effect of negligence upon the rights of legal and equitable mortgagees. This was a contest for priority between two equitable mortgagees. The first mortgage in point of date was in respect of an advance made by the plaintiff to the mortgagor to enable him to purchase a property, on the understanding that upon the purchase being completed the title deeds would be handed over to the plaintiff. The mortgagor, however, neglected to hand over the deeds as agreed, but deposited them with the defendants, by way of equitable mortgage, to secure advances, and the defendants retained them for twenty-two years and subsequently obtained a conveyance of the legal estate, without notice of the plaintiff's prior advance. North, J., held that under these circumstances the defendants were entitled to priority, and that as between two equitable mortgagees, negligence, such as omission to obtain possession of the title deeds, is sufficient to postpone an equitable mortgage prior in point of time; and that it is not necessary, as between equitable mortgagees, as it is in the case of legal mortgagees, that the negligence should amount to fraud.

MEMBER OF PARLIAMENT—PRIVILEGE FROM ARREST.

In re Gent, Gent-Davis v. *Harris*, 40 Chy. D. 190, a question arose whether

a member of Parliament who had been a receiver in a cause, and who, after he had been discharged from receiver, had been ordered to pay over funds which he had received as receiver, was liable to attachment: and it was held by North, J., that the attachment for breach of such an order was of a punitive character, and therefore not subject to privilege of Parliament, and it was also held that a person who owes money come to his hands as receiver, is in a fiduciary capacity.

GUARDIANSHIP OF INFANT ACT (49 & 50 VICT. c.27)—(R.S.O. c. 137, s. 1)—RIGHTS OF MOTHER AS GUARDIAN—RELIGIOUS EDUCATION OF INFANT.

In re Scanlon, 40 Chy. D. 200, is a decision of Sterling, J., and shows that the recent *Guardianship of Infants Act* (49 and 50 Vict., c. 27) (in R.S.O. c. 137, s. 1), has made no change in the law as regards the general rule which requires that infants shall be brought up in the religion of their deceased father. In this case the deceased father was a member of the Church of England, and the surviving mother was a Roman Catholic. The Court, under the second section of the Act, appointed two Protestants to act as co-guardians with the mother, and directed that the children should be brought up as members of the Church of England.

Correspondence.

NOTARIES PUBLIC OF ONTARIO.

To the Editor of THE CANADA LAW JOURNAL:

Dear Sir,—Complaints are made that the Notaries of Ontario take no oath of office. The Lieutenant-Governor appoints as Notaries persons possessed of certain qualifications. A Commission issues, worded as follows:—"I have appointed, and do hereby appoint him, the said Geoffrey Quilldriver, to be a Notary Public in and for the Province of Ontario. To have, use and exercise the power of drawing, passing, keeping and issuing all deeds, contracts, charter parties and other mercantile transactions; and also to attest all commercial instruments that may be brought before him for public protestation." The fee of $8 is paid. The appointment is gazetted in the Official Gazette—and the new Notary Public is left to make the most of his important privileges. But he is not sworn to do his duty.

Let us consider whether there is a just cause for complaint in leaving our Notaries unsworn; whether an oath should be imposed; and what should be the form of that oath.

The only outward and visible inconvenience in a Notary Public for Ontario not being sworn, is that always found by those living under laws and customs different from those of their near and intimate neighbors. The word "sworn," for instance, has to be struck out wherever it occurs in the Notarial Certificates prepared in other countries and provinces and sent to Ontario for completion or execution.

According to the Revised Statutes of the State of New York, vol. 1, page 368, section 24, 7th edition, the following is the oath or affirmation required of a Notary Public before entering on the duties of his office, viz :—"I do solemnly swear (or "affirm" as the case may be) that I will support the Constitution of the United States and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of Notary Public to the best of my ability."

In the State of Pennsylvania the oath of a Notary runs as follows :—"You do swear that you will well and faithfully perform the duties of your office of Notary Public, and that you will support the constitution of the commonwealth of Pennsylvania." (Dunlap's Forms, p. 116.)

In the Province of Quebec :—"Before commencing to practise, every Notary must take the oaths of office and allegiance before a judge of the Superior Court, a certificate whereof is entered on his commission." Article 3831, Revised Statutes of Quebec, 1888.

In France, the *Organisation du Notariat*, 1866, declares :—"*Le Notaire n'aura le droit d'exercer qu'a compter du jour ou il aura prêté serment.*" (Section 48.)

In England, by 6 & 7 Vict., chap. 90, section 7 (1843), it was enacted that "every person to be admitted and enrolled a public Notary shall, before a faculty is granted to him authorising him to practise as such, *in addition to the oaths of allegiance and supremacy*, make oath before the master of the faculties, his surrogate or other proper officer, in substance and to the effect following :—"I. A. B., do swear that I will faithfully exercise the office of a Public Notary ; I will faithfully make contracts or instruments for or between any party or parties requiring the same, and I will not add or diminish anything without the knowledge and consent of such party or parties, that may alter the substance of the fact ; I will not make or attest any act, contract or instrument in which I shall know there is violence or fraud ; and in all things I will act uprightly and justly in the business of a Public Notary, according to the best of my skill and ability. So help me God."

In addition to this oath the oaths of allegiance and supremacy were required, except in certain cases where another form of oath was substituted by Act of Parliament.

This continued to be the law until the year 1874, when 6 & 7 Vict., c. 90, s. 7, was amended by the Statute Law Revision Act, No. 2, of 37 & 38 Vict., c. 96, which repealed the words "in addition to the oaths of allegiance and supremacy."

The answer to the query whether an oath should be imposed on Ontario Notaries is answered practically we think by the custom of the countries we have named—the commercial centres of the world.

"An oath is a reverent appeal to God, in corroboration of what one says, invoking, according as his declaration is sincere or deceptive, the divine blessing or punishment in another life." (Abbott's Dictionary, verbo Oath.)

The use of oaths is defended by the following reasons :—"Oaths are required

from persons elected to public offices, because it is presumed that persons under the obligation of an oath will be more likely to act conscientiously." (Young's U. S. Citizen's Manual.) "Politicians and moralists have placed much reliance on oaths as a practical security." (Ency. Britannica.) "The oath is an institution established as a precaution against the inconstance or unfaithfulness of man." (Bouvier, American Law.)

As to the form and matter of the oath or oaths Mr. Mowat should impose upon his Notarial subjects, he should certainly, for the welfare of his Province re-enact the provisions of the Imperial Act, 6 & 7 Vict., chap. 90, s. 7, and make the law of Ontario in this matter correspond to the law of England between 1843 and 1874. This would compel the Notaries of Ontario to take an oath of office, the oath of allegiance and the oath of supremacy.

In these days of Jesuitism, Socialism, Fenianism and disloyalty to the constitution, it would be a wise and statesmanlike precaution to make every Canadian declare "that no foreign prince, person, prelate, state or potentate hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this Dominion."

It may be said that this last oath would exclude some men. Well, be it so, for who can safely trust that Notary who has been taught to believe or who has been and is being taught by teachers who believe, "That it is no deadly sin to steal, or privately against his will and without his knowledge, to take a thing, from him who is ready to give it if he were asked, but will not endure to have it taken without asking," (*Emanuel Sa, aphorisms, verbo Furtum.*) "That it is not theft privately to take a thing that is not great from our Father," (same authority.) "That he who sees an innocent punished for what himself hath done, he in the meantime who did it, holding his peace, is not bound to restitution," (*Emanuel Sa, aphorisms, verbo Restitutio.*) "To detract from our neighbor's fame before a conscientious, silent and a good man, is no deadly sin," (*Antonin Diana, verbo Detractio, num.* 5.)

A NOTARY PUBLIC.

Reviews and Notices of Books.

Digest of the Reported Cases in the Supreme Court of New Brunswick from 1879 to 1886, with Digest of the Cases in the Supreme Court of Canada decided on Appeal from the Supreme Court of New Brunswick, a continuation of Stephens' Digest. By JAMES G. STEPHENS, ESQ., Q. C., County Court Judge. Toronto: Carswell & Co.

We are in receipt of this book, which seems to be carefully prepared. We notice, however, a rather long list of errata, which should be avoided. The typographical execution is very good.

Digest of Insurance Cases, embracing the Decisions of the Supreme and Circuit Courts of the United States and the Supreme Courts of the various States and Foreign Countries upon Disputed Points in Fire, Life, Marine, Accident, and Assessment Insurance, and Fraternal Benefit Orders, together with a Reference to Annotated Insurance Cases in Editorials in Law Journals on Insurance cases for the year ending October 1st, 1888. By JOHN A. FINCH. Indianapolis: Rough Notes Publishing Company.

This publication is of value to the profession, and will be more so if continued with regularity. One would hardly suppose that all the cases contained in the reports referred to in the title page could be included in a volume of 100 pages. We presume, however, that it is as stated. An index at the end of the volume gives the arrangement of the subjects, and an appendix gives the Law Periodical from which the cases are taken.

The Lives of the Judges of Upper Canada from 1791 to the Present Time. BY DAVID B. READ, Q.C., Historian of the County of York Law Association. Toronto: Rowsell & Hutchison.

We can readily believe that, as the author says in the opening sentence of the preface, writing the lives of the Judges have been to him a work of love as well as of duty. Our author's well-known interest in the early history of the Province led him to publish sketches of the lives of some half-dozen of the early Judges in *The Magazine of Western History*, and the accounts thus begun readily expanded into the present handsome volume. It is fortunate that the labor of recording so many interesting and valuable facts as are contained in the work before us, fell to the lot of one to whom it was so congenial, and whose experience and patient industry so well qualified him for it.

The introductory chapter deals with the period from the Conquest to the Constitutional Act, and narrates the changes that were made in the law and its administration during that time. But it is with the lives of successive Judges in their judicial capacity, and as public men influencing the progress of the Province, that the book has mostly to do. Of the Judges as men in private life little is said. A natural curiosity based on that human sympathy which leads everybody to take an interest in his fellow-beings, would cause most readers to wish that the occasional glimpses furnished them of the man beneath the Judge's robes had been more numerous. The array of facts collected and arranged here, relating to the early days of the Province, and to some of those most active in giving form to its institutions and guiding its course, is a valuable contribution to our historical knowledge. Few Canadians can read this book without making extensive additions to their knowledge of the history of the most important Province of their country. We venture the opinion, however, that many lay readers would willingly forego some few of the many accounts of important trials in which

one and another of the Judges took part, either judicially or as counsel before their elevation to the bench, if their place had been supplied by characteristic ancedotes such as occasionally crop out. The book would not be complete without the chapter on "The Law Society and Osgoode Hall," a chapter which turns one's thoughts back to the older days when legal studies were in their infancy in Ontario. The concluding chapter gives some enjoyable reminiscences of incidents which go to show that the legal mind is not deficient in the keen perception of the ridiculous, nor slow in giving expression to the humorous.

Notes on Exchanges and Legal Scrap Book.

A NEW LEGAL PUBLICATION.—A welcome exchange is *The Green Bag*, in its own words described "as a useless but entertaining magazine for lawyers." It does not intend to give facts of a kind that will be available in working up cases or deciding knotty points of law, but it seeks rather to give information of a more general character, which is but none the less interesting on that account. "It offers a little toothsome literary cake and jam, to offset the heavy bread and the over-cooked meats of the legal table." Number 3 of Volume I., lately received, may be taken as a fair specimen of the numbers already issued. It contains, amongst other articles, a Sketch of the Life of Chief Justice Shaw, of Massachussetts, and portrait; an Account of a Visit to some English Prisons; a full description of the Law School of the University of Pennsylvania, with portraits of its six Professors; Causes Célèbres, iii.; the Mystery of the Rue de Vaugirard; the Temple; Gossip of an old French Lawyer; Old Inns of Court Customs; and the Editorial Department. Our new friend is published at Boston. We venture to predict that it will become a general favorite.

DIARY FOR APRIL.

1. Mon ....County Court Sittings for Motions begin.
2. Tue ....County Court Non-Jury Sittings, except in York.
6. Sat.....County Court Sittings for Motions end
7. Sun ....*5th Sunday in Lent. Passion Sunday.*
14. Sun ....*6th Sunday in Lent. Palm Sunday.*
15. Mon ....County Court Non-Jury Sittings in York.
19. Fr.....Good Friday.
20. Sai.....Last day for Primary Notices.
21. Sun ....*Easter Sunday.*
22. Mon ....Easter Monday.
23. Tue ....St. George's Day.
25. Thu ....St. Mark.
28. Sun ....*1st Sunday after Easter. Low Sunday.*
30. Tue ....Primary Examination.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

[March 18.

O'BRIEN *v.* THE QUEEN.

Appeal—Contempt of Court—Discretion—Jurisdiction—Constructive contempt—Interference with a judicial proceeding—Proceedings for contempt—Locus standi—Punishment—Infliction of costs.

An appeal will lie to the Supreme Court of Canada from the judgment of a Provincial Court in a case of constructive contempt. Such a decision is not an order made in the exercise of the judicial discretion of the Court making it, from which, by sec. 27 of the Supreme and Exchequer Courts Act, no appeal shall lie. TASCHEREAU, J. *hesitante.*

Such an appeal will lie though no sentence was pronounced against the party in contempt, but he was found guilty and ordered to pay the costs of the proceedings.

H. was elected Mayor of Toronto and was unseated by a Master in Chambers on proceedings in the nature of a *quo warranto* instituted for the purpose, the Master holding that the property qualification of H., who had qualified in respect to property of his wife, was insufficient. Notice of appeal was given, but a declaratory Act having been passed by the Ontario Legislature removing such disqualification, such notice was countermanded and the appeal abandoned. In the meantime O'B., solicitor for H., had written a letter to a newspaper in Toronto in which the following expressions occurred, after the statment of the fact that the qualification condemned had always been held sufficient and had never before been questioned :

"Chief Justice Richards, probably the best authority on such matters in Canada, had held in 1871 that under such circumstances the husband had the right we contend for in the present case. This decision has never been over-ruled, is consistent with common sense and with the universally accepted opinion on the subject.

"You may naturally ask: Why then was the decision the other way? This question I am unable to answer. The delivered judgment affords no answer. The arguments addressed were simply ignored, and the authority relied on by us, so far from being explained or distinguished, was not even referred to. This is eminently unsatisfactory to both the profession and the public—an officer of the Court over-ruling the judgment of a Chief Justice who, above all others in our land, was skilled in matters of municipal law."

Proceedings were instituted by the original relator in the proceedings to unseat H. to have O'B. committed for contempt. The notice of abandonment of the appeal had been given before such proceedings were begun.

Held, 1. That the appeal being abandoned the *quo warranto* proceedings were at an end, and the relator had no *locus standi* in such proceedings to enable him to charge O'B. with contempt in interfering with the judicial proceeding. In such case only the Court could institute or instigate the proceedings.

2. That the publication complained of was only a fair criticism of a judicial proceeding which any person is privileged to make.

3. That the infliction of costs was a punishment for the alleged contempt in the nature of a fine, so that the appeal was not one for costs only.

Appeal allowed.

S. H. Blake, Q.C., for the appellant.

Bain, Q.C., for the respondent.

[March 18.

CITY OF LONDON *v.* GOLDSMITH.

Municipality — Construction of street crossing —Elevation above the sidewalks—Injury to person crossing—Liability of municipality for.

G. brought an action against the city of

L. for damages caused by striking her foot against a street crossing in said city and falling, whereby she was hurt. The principal ground on which negligence was based was that the crossing was elevated some three or four inches above the level of the street, which rendered accidents of the kind in question more likely to occur. The jury gave G. a verdict with $500 damages, which the Divisional Court and the Court of Appeal, the latter Court being equally divided, affirmed. On appeal to the Supreme Court of Canada,—

Held, reversing the judgment of the Court of Appeal (14 Ont. App. R.), Strong and Fournier, JJ., dissenting, that the fact of the street crossing being higher than the street did not make the city liable.

Appeal allowed.

W. R. Meredith, Q.C., for the appellants.

R. M. Meredith and *Love*, for the respondent.

[March 18.

KINGSTON & PEMBROKE RAILWAY *v.* MURPHY.

Ry. Co—Expropriation of land — Description in map or plan filed—42 Vic., ch. 9.

No land can be taken for the line of a railway as originally located, or for any deviation therefrom, at any point therein, until the provisions as to places and surveys prescribed as to the original line (by 42 Vic., ch. 9, Railway Act of 1879) are complied with as to every such deviation.

Therefore, where a road had been completed and the company, having obtained additional powers from Parliament as to land they could hold in K., sought to expropriate the land of M., which was not on the map or plan originally registered.

Held, affirming the judgment of the Court of Appeal for Ontario, that they were not entitled to such expropriation.

Appeal dismissed.

Christopher Robinson, Q. C., and *Cattanach*, for the appellant.

S. H. Blake, Q.C., and *Britton*, Q.C., for the respondents.

[March 18.

ELLIS *v.* BAIRD.

Appeal—Contempt of Court—Final judgment—Practice.

E. was served with a rule issued by the Supreme Court of New Brunswick, calling upon him to show cause why a writ of attachment should not issue against him, or he be committed for contempt of Court in publishing certain articles in a newspaper. On the return of the rule, after argument, it was made absolute and a writ of attachment was issued. E. appealed from the judgment making the rule absolute, and by the case on appeal it appeared that the practice in such cases in New Brunswick is that the writ of attachment is issued only in order to bring the party into Court, when he may be ordered to answer interrogatories by which he may purge his contempt, and if he fails to do so the Court may pronounce sentence; but no sentence can be pronounced until the party is brought before the Court on the writ of attachment.

The counsel for the respondent moved to quash the appeal for want of jurisdiction.

Held, that the judgment appealed from was not a final judgment from which an appeal would lie to the Supreme Court of Canada under sec. 24 (a) of the Supreme and Exchequer Courts Act, R.S.C., c. 135.

Appeal quashed without costs.

L. H. Davies, Q.C., for appellant.

L. A. Currie, for respondent.

[March 18.

WINCHESTER *v.* BUSBY.

Trover—Conversion—Bill of lading—Refusal to deliver cargo—Pre-payment of freight—Expenses of storage.

W. was master of a vessel carrying a cargo of coal for B. On arrival W. refused to deliver the coal unless the freight was pre-paid, which B. refused, offering to pay freight ton by ton as delivered. The agent of the owners then caused the coal to be stored, on which the whole freight was tendered by B. and the coal demanded, which the agent refused unless the expenses of the storage were paid. In an action of trover against W.,

Held, affirming the judgment of the Court below, GWYNNE, J. dissenting, that there was a conversion of the coal for which B. could recover in trover.

Held, per PATTERSON, J., that B. had a right of action, but not against the master of

the vessel, and that the appeal should be allowed on that ground.

Appeal dismissed with costs.

Weldon, Q.C., for the appellant.

W. Pugsley and *C. A. Palmer*, for the respondent.

[March 18.

NEW BRUNSWICK RY. CO. *v.* VANWART.

Railway Co—Negligence—Duty of company—Contributory negligence.

V. was at a siding of the N. B. Ry. with a pair of spirited horses. He was told that a train was approaching and endeavored to unhitch the horses, but before he could do so the train came along, the horses took fright and ran away, and V. was dragged on the track where he was killed. There was no notice of the approach of the train by whistle or ringing of a bell, and the company not coming under the general Railway Act, were not bound to give such warning. The train was the ordinary freight and was proceeding at its usual rate of speed.

Held, reversing the judgment of the Court below, that the facts presented did not show such negligence by the servants of the company as would make them liable in damages for V.'s death.

Held, also, that if the company were liable the father of the deceased would have had reasonable expectation of future pecuniary benefit from the life of his son, and would be entitled to share in the damages.

Appeal allowed and non-suit ordered.

C. W. Weldon, Q.C., for the appellants.

J. A. Vanwart, for the respondent.

[March 18

THE QUEEN *v.* CHESLEY.

V., a government official, requested C. to sign a bond as surety for the faithful discharge of his duty as such official. C. having agreed to do so, V. produced a blank form of bond and C. signed his name to it and to an affidavit of justification and acknowledged to a third party that he had executed such bond. The third party made an affidavit of the execution before a magistrate, who gave a certificate of its due execution before him. The bond, which had been filled out for the sum of $2000, was then sent to Ottawa to be registered as the statute requires.

In an action on the bond against C. on default by V., C. claimed that the amount of the bond was represented to him to be $500 or $1000, that there was no seal on it when he signed it, that he had not sworn to the affidavit of justification, and that the magistrate should not have given the certificate he did. The Court below held, affirming the judgment of the trial judge, that C. was estopped from denying the execution of the deed, but as his action was not the proximate cause of the acceptance of the bond by the Government, but that the false certificate given by the magistrate was, the Crown could not recover. On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the Court below, that the making of the bond was the real cause of its acceptance and the defendant being estopped, the Crown was entitled to judgment.

Appeal allowed.

R. L. Borden, for the appellant.

Harrington, Q.C., for the respondent.

[March 18

WALLACE *v.* SOUTHER.

A promissory note made payable to John Souther & Son was sued on by John Souther & Co.

Held, that it being clear by the evidence that the plaintiffs were the persons designated as payees, they could recover.

It was no objection to the validity of a promissory note that it is for payment of a certain sum in currency. Currency must be held to mean "United States Currency" particularly when the note is payable in the United States.

If a note was insufficiently stamped the double duty may be affixed as soon as the defect comes to the actual knowledge of the holder. The statute does not intend that implied knowledge should govern it.

The appellant claimed that he was only a surety for his co-defendant, and that he was discharged by time being given to the principal to pay the note.

Held, that the fact of time being so given being negatived by the evidence, it was im-

material whether appellant was principal or surety.

Appeal dismissed with costs.

T. J. Wallace, appellant in person.

Arthur Drysdale, for the respondent.

[March 18.

CONFEDERATION LIFE ASSOCIATION *v.* O'DONNELL.

Life insurance—Policy—Memo on margin—Want of countersignature—Effect of—Admissibility of evidence.

A policy of life insurance sued on had in the margin the following memo: "This policy is not valid unless countersigned by..... agent at.....countersigned this..... day of..... Agent."

This memo. was not filled up, and the policy was not, in fact, countersigned by the agent. Evidence was given of the payment of the premium, and rebutting evidence by the company that it had never been paid. The jury found that the premium was paid and the policy delivered to the deceased insured as a completed instrument, and a verdict was entered for the plaintiff and affirmed by the Supreme Court of Nova Scotia.

Held, affirming the judgment of the Court below, Sir W. J. Ritchie, C.J., and Gwynne, J., dissenting, that the necessity of countersigning by the agent was not a condition precedent to the validity of the policy, and the jury having found that the premium was paid their verdict should stand.

The judgment on the former appeals in this case was, on this point, substantially adhered to. See 10 Can. S.C.R. 92, and 13 Can. S.C.R. 218.

Appeal dismissed with costs.

S. H. Blake, Q.C., *J. Beaty*, Q.C., and *Borden*, for the appellants.

Weldon, Q.C., and *Lyons*, for the respondent.

[March 18.

TUPPER *v.* ANNAND.

Contract — Mining land — Speculation in — Agreement with third party—Renewal of—Effect.

T. being in Newfoundland, discovered a mine of pyrites, and on returning to Nova Scotia he proposed to A. that they should buy it on speculation. A. agreed and advanced money towards paying T.'s expenses in going to Newfoundland to secure the title. T. made the second journey and obtained an agreement of purchase from the owner of the mine for a limited time, but, failing to effect a sale within that time, the agreement lapsed. It was renewed, however, some two or three times, A. continuing to advance money for expenses. Finally T. effected a sale of the mine at a profit, and had the necessary transfers made for the purpose, keeping the matter of the sale a secret from A. On an action by A. for his share of the profit under the original agreement,

Held, affirming the judgment of the Court below, that the sale related back, as between T. and A., to the date of the first agreement and A. could recover.

Appeal dismissed with costs.

W. B. Ross, for appellants.

G. H. Fielding, for respondent.

[March 18.

O'CONNOR *v.* MERCHANTS MARINE INSURANCE CO.

Marine Insurance—Policy—Perils of the seas—Barratry—Loss by—Construction of policy.

In a marine policy insuring against loss by 'perils of the seas," there was no mention of barratry. The vessel being lost it was found, in an action on the policy, that such loss was caused by the barratrous act of the master in causing holes to be bored by which the vessel was sunk.

Held, STRONG, J., dissenting, that this loss was not occasioned by "perils of the seas," and the fact of barratry not being expressly excepted in the policy, would not entitle the insured to recover.

Appeal dismissed with costs.

McMaster, Q.C., and *W. B. Ross*, for appellant.

MacCoy, Q.C., for respondents.

[March 18.

WHITMAN *v.* UNION BANK OF HALIFAX.

Assignment in trust for creditors—Preference—Liability of assignee—Limitation of—Release of debtor—Resulting trust—13 Eliz c. 5.

A deed by C. assigning all his property to

W. in trust for the benefit of creditors, provided that six creditors should first be paid in full; that if sufficient assets remained for the purpose twenty-four other creditors should next be paid in full: that the balance, if any, should be distributed ratably among all the creditors not so preferred, and the surplus returned to the debtor. The deed provided for a release and discharge by the executing creditors of their respective claims against the debtor, and this provision, "that the party of the second part (the trustee W.), his executors or administrators shall not be liable or accountable for more money or effects than he shall receive, nor for any loss or damages which may happen in reference to the said trusts, unless it shall arise by or through his own wilful neglect." In a suit by an unpreferred creditor for a large amount to have the deed set aside,

Held, affirming the judgment of the Court below, GWYNNE and PATTERSON, JJ. dissenting, that the deed was one which it was unreasonable to expect creditors to become parties to, and was void under the statute 13 Eliz. c. 5, as tending to defeat and delay creditors in the recovery of their claims and as containing a resulting trust in favor of the debtor.

Appeal dismissed with costs.

Harrington, Q.C., for appellant.

R. L. Borden and *W. B. Ritchie*, for the respondent.

[March 18.

MUTUAL RELIEF SOCIETY OF NOVA SCOTIA *v.* WEBSTER.

Life Insurance—Mutual company—Bond of membership — Warranty — Concealment of facts—Misstatement.

On an application for insurance in a mutual assessment insurance society, the applicant declared and warranted that if in any of the answers there should be any untruth, evasion or concealment of facts, any bond granted on such application should be null and void. In an action against the company on a bond so issued, it was shown that the insured had misstated the date of his birth, giving the 19th instead of the 23rd of February, 1835, as such date, that he had given a slight attack of apoplexy as the only disease with which he had been afflicted, and the company contended that it was, in fact, a severe attack; that he had stated that he was in "perfect health" at the date of the application, which was claimed to be untrue; that he had suppressed the fact of his being subject to severe bleeding at the nose; and that the attack of apoplexy which he had admitted occurred five years before the application, when the fact was that it had occurred within four years. The trial judge found that the misstatement as to date of birth was immaterial, as it could not have increased the number of years on which the premiums were calculated; that the attack of apoplexy was a slight, not a severe attack; that the applicant was in "good" if not "perfect" health when the application was made; that the bleeding at the nose to which the insured was subject was not a disease, and not dangerous to his health; but that the misstatement as to the time of the occurrence of the attack was material and on this last issue he found for the society, and on all the others for the plaintiff. The Court *in banc* reversed this decision and gave judgment for the plaintiff on all the issues, holding that as to the issue found by the trial judge for the society, there was a variance between the plea and the application which prevented the society from taking advantage of the misstatement. On appeal to the Supreme Court of Canada:

Held (GWYNNE and PATTERSON, JJ. dissenting), that the decision of the Court *in banc* was right and should be affirmed.

Appeal dismissed with costs.

Bingay, Q.C., and *Borden*, for the appellant.

Harrington, Q.C., and *Gormully*, for the respondent.

[March 18.

TRAINOR *v.* THE BLACK DIAMOND S. S. Co.

Bill of lading — Exceptions — Construction — Improper stowage—Negligence — Liability of ship owner.

A bill of lading acknowledged the receipt on board a steamer of the defendant company of a number of packages of fresh meat shipped in good order and condition, and which the defendants undertook to deliver in like good order and condition at the Port of St. John's, Newfoundland, subject to the following exceptions among others, in respect of which the defendants would not be

liable for damage: "Loss or damage arising from sweating, decay, stowage, or from any of the following perils, whether arising from the negligence, default or error in judgment of the pilot, master, mariners, engineers or other persons in the service of the ship, or for whose acts the ship owner is liable (or otherwise howsoever)." (Naming them.)

Held, per STRONG, TASCHEREAU and GWYNNE, JJ., that the words "whether arising from the negligence, default or error in judgment of the pilot," etc., applies as well to the exceptions which precede as to those which follow them, and would relieve the defendants from liability for damage by stowage so arising. RITCHIE, C.J. and FOURNIER, J., contra.

The damage to the meat shipped was occasioned by its being taken on board during a heavy rain, stowed in uncovered hatchways, and the men stowing it trampled upon it with muddy boots and spit tobacco juice upon it.

Held, affirming the judgment of the Supreme Court of Prince Edward Island, RITCHIE, C.J. and FOURNIER, J., dissenting, that the loss arose from stowage arising from the negligence of persons for whose acts the ship owners were liable, and the defendants were relieved by the exceptions in the bill of lading.

Appeal dismissed with costs.

L. H. Davies, Q.C., and *Morson*, for appellant.

Fred. Peters, for respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[March 19.

CLARKSON *v.* THE ATTORNEY-GENERAL OF CANADA.

Crown—Customs duties—Assignment for the benefit of creditors—Preference of Crown over subject—Writ of extent—R.S.O., c. 94.

On the 3rd February, 1887, B., a coal merchant, made an assignment to the plaintiff for the benefit of his creditors. At the time of this assignment there was due by B. a large sum for duty on coal that had been previously imported by B. and sold. The Crown claimed payment from the plaintiff as assignee of B. of the amount due for duties in priority to the payment of the claims of the general creditors of the estate.

Held, affirming the judgment of ARMOUR, C.J., reported 15 O.R. 632, that the Crown was not entitled to payment in priority to the general creditors of the estate, but that having come in under the assignment the Crown was bound by the terms of the assignment, and could take only rateably and proportionately with the other creditors.

By an agreement entered into before action, the Crown was placed in the same position as if a writ of extent had been issued by the Crown against B. on the 19th day of February, 1887, for the recovery of the duty payable by B.

Held, in this also, affirming the judgment of ARMOUR, C.J., that a writ of extent so issued would have availed the Crown nothing as far as any property covered by the assignment was concerned.

Robinson, Q.C., for the appellant.

Lash, Q.C., for the respondent.

Re McDONAGH & JEPHSON.

An error crept into the note of *Re McDonagh & Jephson* in our last number. The proceeds of sale were directed to be divided among creditors (2), (3) and (4), and not among (2) and (3) only, as reported *ante*. p. 185.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Div'l Ct.] [Feb. 4.

ATKINSON *v.* GRAND TRUNK RAILWAY CO'Y.

Railways—Negligence—Accident—Proximate cause—Impact.

The plaintiffs, husband and wife, sued for damages for injuries sustained by the wife, charging the defendants with negligence in using their railway in shunting cars, etc., and in not notifying and protecting the public at crossings.

The wife was being driven in a cutter by her son along a street which crossed three tracks of the defendants, and when the cutter was thirty feet away a "silent" car passed along one of the tracks. The son pulled the horse up suddenly, with the effect of throwing the mother out of the cutter and so producing the injury complained of.

The jury found that the defendants were guilty of negligence, and that the son by his driving contributed to the accident.

Held, that, upon the evidence, the finding of contributory negligence could not be interfered with; and that the injury was too remote a consequence to be attributed to the negligence of the defendants. It was not necessary to consider whether actual impact was indispensable.

Lount, Q.C., for plaintiffs.

Osler, Q.C., for defendants.

Div'l Ct.] [Feb. 4.

COUNTIES OF LEEDS AND GRENVILLE *v.* TOWN OF BROCKVILLE.

Canada Temperance Act—Application of fines—49 V. c. 48, s. 2—Construction of orders-in-council—County and town.

The Canada Temperance Act came into force in the united counties of L. and G. on 1st May, 1886. On 2nd June, 1886, the Parliament of Canada passed the Act 49 V., c. 48, s. 2 of which provided that the Governor-in-Council might from time to time direct that any fine, etc., which would otherwise belong to the crown for the public uses of Canada, should be paid "to any provincial, municipal or local authority which, wholly or in part, bore the expenses of administering the law under which such fine, etc., was enforced, or that the same should be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration."

On 29th September, 1886, an order-in-council was passed directing that all fines, etc., recovered or enforced under the Canada Temperance Act within *any city or county* which had adopted the Act, which would otherwise belong to the Crown for the public uses of Canada, should be paid to the treasurer of the city or county, as the case might be, for the purposes of the Act.

On the 15th November, 1886, a second order-in-council was passed directing that the first should be cancelled, and that all fines, etc., recovered or enforced under the Act within *any city or county or any incorporated town separated for municipal purposes* from the county, should be paid to the treasurer of the city, incorporated town, or county, as the case might be, for the purposes of the Act.

The town of B. was at the time the Act was brought into force an incorporated town separated from the counties of L. and G. for municipal purposes; and between the dates of the two orders-in-council the police magistrate of the town paid to the treasurer of the counties $750, the amount of fines recovered and enforced by him for violations of the Canada Temperance Act within the town.

Held, STREET, J., dissenting, that, in the absence of any application by the treasurer of the counties of the moneys so paid to him, the town of B. was entitled to recover it from the counties. The passing of the second order-in-council was a complete revocation of the first, and the second was retroactive in the sense that it provided for the application of all fines, etc., theretofore recovered or enforced.

Per STREET, J.—The first order-in-council operated as a gift from the Crown to the municipality, with an intimation added as to the purpose to which it was expected the gift would be applied, but carrying with it no legal obligation that it should be applied in any particular manner. It was a complete gift; the money was finally at home, so far as the Crown was concerned, when the municipality received it, and the revocation of the order could not revoke a complete transaction, nor retract that which had been actually done under it.

Shepley, for the plaintiffs.

Fraser, Q.C., and *Aylesworth*, for defendants.

Div'l Ct.] [Feb. 4.

WILLS *v.* CARMAN.

Libel—Question for jury—New trial—Misdirection—Objection at trial—Pleading—Fair comment—Admissibility of evidence of truth of matters commented upon.

In actions of libel new trials are not granted merely on the ground that the verdict is against evidence and the weight of evidence. It is

for the jury to say whether alleged defamatory matter published is a libel or not, and the widest latitude is given to them in dealing with it.

When no objection is made at the trial to the Judge's charge, the ground of misdirection is untenable on a motion for a new trial.

In this action of libel the defendant did not plead justification, but he said in his defence that the alleged libel was a fair comment upon matters of public and general interest.

Held, that he was entitled under this defence to show that the matters upon which he commented were true.

Lefroy v. *Burnside*, 4 L. R. Ireland 556; *Davis* v. *Shenstone*, 11 App. Case 187; and *Riordan* v. *Willcox*, 4 Times L. R. 475, referred to.

Dickson, Q.C., and *Burdett*, for plaintiff.

Clute, for defendant.

Div'l Ct.] [Feb. 4.

WELLS *v.* INDEPENDENT ORDER OF FORESTERS.

Insurance—Life—Benevolent society—Standing of deceased member—Re-instatement—Estoppel—Waiver—Costs.

W., who was a member of a subordinate court of the defendant society, died on the 6th May, 1884. His administratrix claimed in this action the amount of an endowment certificate upon his life, which was subject to a condition that the assured should at the time of his death be a member of the society in good standing. W. had not paid his assessment due 1st March, 1884, and by his failure to pay had become at once suspended by virtue of one of the by-laws of the society, and his name appeared in the minutes of a meeting held that month upon the list of suspended members. He had taken cold at Christmas, 1883, and by the end of February, 1884, it was apparent that he could not recover, and he never rallied up to the time of his death. Shortly before the 25th April, 1884, a sum sufficient to pay his assessments due 1st March, 1st April, and 1st May, was paid on his behalf to the financial secretary of the subordinate court. The conditions to be performed by a suspended member desirous of being reinstated after a suspension had been in force for thirty days, were, according to the by-laws, payment of arrears, passing medical examination, and being approved of by two-thirds vote of the subordinate court. It was not possible for W. to have complied with the second condition, and he did not attempt to do so.

Held, that the by-laws were binding upon W. and the plaintiff, and that he not having been reinstated in accordance therewith, was not a member in good standing at the time of his death.

It was contended, however, that the fact of the receipt of the arrears by the financial secretary, and certain other circumstances, showed a waiver or created an estoppel on the part of the defendants.

It appears that the financial secretary was not familiar with the by-laws and thought, and informed W. that he was restored to good standing by the payment of arrears; that he transmitted the assessments paid to the supreme secretary of the society, who received and retained them, but carried them to the credit of the subordinate court, instead of to the credit of W., because in his view the reinstatement was not completed; and that W. was reported reinstated by the subordinate court on 25th April, 1883. The financial secretary had the right under the by-laws to receive the arrears, but only as a first step towards reinstatement.

Held, that in view of the fact that W. was hopelessly ill when the supreme secretary acknowledged the receipt of the assessments, there was no ground for the contention that the defendants were estopped from denying that they accepted the money with the intention of keeping the policy alive and of waiving the medical examination; and that under all the circumstances there was neither the intention nor the authority on the part of the supreme secretary to waive the examination.

As the plaintiff had been led by the action of the supreme secretary and the officers of the court below to believe that her father had been reinstated, no costs were given against her.

Tremeear, for plaintiff.

J. A. McGillivray, for defendants.

Full Ct.] [March 7.

REGINA *v.* RYMAL.

Criminal law—False pretences—Contract to pay money—Giving promissory note instead of money—Valuable security.

The defendant by untrue representations

made with knowledge that they were untrue, induced the prosecutor to sign a contract to pay $240 for seed wheat. The defendant also represented that he was the agent of H., whose name appeared in the contract. H. afterwards called upon the prosecutor and procured him to sign and deliver to him a promissory note in his, H.'s, favor for the $240. The contract did not provide for the giving of a note, and when the representations were made the giving of a note was not mentioned. The prosecutor, however, swore that he gave the note because he had entered into the contract.

The defendant was indicted for that he by false pretences fraudulently induced the prosecutor to write his name upon a paper so that it might be afterwards dealt with as a valuable security, and upon a second count for by false pretences procuring the prosecutor to deliver to H. a certain valuable security.

Held, upon a case reserved, that the charge of false pretences can be sustained as well where the money is obtained or the note procured to be given through the medium of a contract, as where obtained or procured without a contract; and the fact that the prosecutor gave a note instead of the money, by agreement with H., did not relieve the prisoner from the consequences of his fraud; the giving of the note was the direct result of the fraud by which the contract had been procured; and the defendant was properly convicted on the first count as being guilty of an offence under R. S. C., c. 164, s. 78; but

Held, that the note before it was delivered to H. was not a valuable security, but only a paper upon which the prosecutor had written his name so that it might be atterwards used and dealt with as a valuable security, and the conviction of the defendant upon the second count could not stand. *Rex.* v. *Danger, Dearsley & Bell*, 307, followed.

Farewell, for the Crown.

Dow, for the defendants.

Common Pleas Division.

Divisional Court.] [Feb. 8.

ALLENBY *v.* MOORE, *et al.*

School trustee—Office vacated by non-residence —R.S.O. c. 225, s. 98, ss. 98 and ss. 106 and 246—Time of bringing action against board—Costs.

This was action for a mandamus to compel the defendants as remaining trustees of the Village School Board of London West, to declare vacant the seat of J.J., oneof the trustees, and order a new election on the ground of his having ceased to be an actual resident in the village. Notice thereof was given by the plaintiff to the defendants on 23rd August, of their statutory duty to do so *forthwith*: R.S.O. cap. 225, sub-section 10, section 98, and sections 106 and 246. On 7th September the defendants met, but took no action. The plaintiff issued his writ on 11th September. The defence stated that they had fulfilled their statutory duty and claimed costs from the plaintiff. Subsequently defendants did order a new election, which took place in October, after the pleadings had closed. There was no dispute as to facts at the trial before MACMAHON, J., who dismissed the action with full costs, on the ground that it was brought too soon. On a motion to review the decision, the Full Court refused to interfere and dismissed the motion with costs.

W. H. Bartram, for plaintiff.

R. M. Meredith, for defendants

Divisional Court.]

REGINA *v.* CARDO.

Criminal law—Rape on daughter—Evidence of.

The defendant was indicted and convicted for committing a rape on his daughter. The learned judge left it to the jury to say whether, on the evidence, the act of connection was consummated through fear, or merely through solicitation.

Held, that the question was one of fact entirely for the jury, and could not have been withdrawn from them, there being ample evidence given to sustain the charge, and it was left to them with the proper direction in such a case.

N. Murphy, for prisoner.

Irving, Q.C., contra.

Divisional Court.]

FERGUSON *v.* ROBLIN.

Master and servant—Responsibility of master for act of servant—Joint wrong-doers.

The plaintiff's son, on the 31st July, 1886,

purchased from defendant R. an organ for $120, payable in 26 monthly instalments of $5 each, a lien receipt being signed by the son, stating that the property was to remain in R. until all the instalments were paid, and authorizing R. in case of default of payment of said instalments to resume possession of the organ, which the son agreed to deliver up to R. when required, R. and his agents and assigns to have full right and liberty to enter any house or premises which the organ might be in and remove same without resorting to any legal process. The organ was sent to the plaintiff's house with whom the son was living, and remained there until the 30th November, when, no instalments having been paid, said R. sent the other defendant, his bookkeeper, and two assistants, to plaintiff's house, with instructions to go and get the organ. The bookkeeper, taking the lien receipt as his authority, went to plaintiff's house, opened the house door and entered the hall, but on his attempting to open the door of the room where the organ was, the plaintiff's wife (the plaintiff and the son being absent) resisted his entrance, when a scuffle ensued and the plaintiff's wife was injured.

Held, that R. was responsible for the acts of his servant, the bookkeeper, for they were done by him in the discharge of what he believed to be his duty and were within the general scope of his authority.

Held, also, that the judgment against both R. and the bookkeeper was maintainable, for it was recovered against them as joint wrong-doers.

J. Macgregor, for plaintiff.

Bigelow, for defendant.

Divisional Court.]

SHERWOOD *v.* CLINE.

County Court—Claim within jurisdiction of—Prohibition.

Where in an action in the County Court, judgment is given for a sum in itself within the jurisdiction of the Court, but which is the balance of a sum beyond the jurisdiction and which was arrived at, not by any settlement or statement of account between the parties, but on the ascertainment of a disputed account.

Held, this was the allowance of a claim beyond the jurisdiction of the Court, and a writ of prohibition was granted.

H. H. Strathy, for plaintiff.

ROSE, J.]

WILBERFORCE EDUCATIONAL INSTITUTE *v.* HOLDEN.

Corporation—Trustee, removal of—Dealing with trust funds—Necessity of making Atty.-Genl. a party.

In an action by a corporation for the removal of one of the trustees, who also acted as secretary, for alleged improper dealing with the corporate funds, judgment was given but without any finding of wilful misconduct, directing such trustee's removal, on the ground that so much doubt was cast upon his dealings with the trusts funds that it would not be proper to allow him to remain a member of the Board.

The action is maintainable without making the Attorney-General a party.

Moss, Q.C. *and Craddock*, for plaintiff.

Maclaren, for defendant.

Divisional Court.]

BOYD *v.* NASMITH.

Cheque—Marking good by bank—Effect of—Discharge of drawer.

The payees of a cheque drawn on the Central Bank took it between two and three o'clock of the day on which it was drawn, to the bank, and at the payee's request the cheque was marked good, the bank, in accordance with their custom, charging the amount of the cheque to the drawer's account. The payees, a few minutes before three o'clock, took the cheque and offered it as part of a deposit at another bank, but it was refused, and on the same day, about five o'clock, the Central Bank suspended payment. On the following day the payees presented the cheque at the Central Bank, but on account of the bank having suspended, payment was refused.

Held, that the drawers of the cheque were discharged from all liability thereon.

Mowat, Q. C., Attorney-General, for plfi.

Maclaren, contra.

STREET, J.]

PECK *v.* CORPORATION OF AMELIASBURG.

Municipal Act—Power to take stock in Bridge Co.—Special Act—Special rate to be levied each year—Form of.

Held, that sub-sec. 2 of section 479 of the Municipal Act R.S.O., ch. 184, providing that the Council of a municipality may pass by-laws for taking stock, etc., in an incorporated company in respect of any bridge, etc., "under and subject to the respective statutes in that behalf," only authorizes the passing of by-laws to take such stock where in any special or general Act under which a bridge Company is incorporated, a provision is contained authorizing the Municipal Council to hold such stock, etc.

Where, therefore, the Act incorporating the Bay of Quinte Bridge Company, 50 and 51 Vic., ch. 97 (D.), did not profess to confer any power on the municipality to take stock, etc., in such company, no power was conferred under the Municipal Act to do so; and a by-law passed by the Municipal Council for such purpose was therefore held bad, and directed to be quashed.

The by-law, instead of, as required by sec. 340 of the Municipal Act, directing specific sums directed to be levied each year for the payment of the debt and interest to be so raised in each year by a special rate sufficient therefore, leaving the amount of the rate to be determined each year, directed that during the currency of the debentures a special rate of interest, so much on the dollar, specifying it over and above all other rates, should be levied and collected in each year.

Held, this also rendered the by-law bad.

A. H. Marsh, for plaintiff.

Watson, contra.

Divisional Court.]

WOOD *v.* MCPHERSON.

Jury—Challenge—Bias of jury—Change of venue.

At the trial of an action the defendant's counsel challenged a juryman for cause. On the learned judge stating that he did not think any cause was shown, and that the counsel had better challenge peremptorily, the counsel did not claim the right to try the sufficiency of any cause against the impartiality of the juryman, but accepted the opinion of the learned judge, and the juryman remained on the jury.

Held, that on a motion for a new trial, an objection to the juryman could not be entertained.

The action was tried at Brantford, and a new trial was moved for at a place other than Brantford, because that the jury there were biassed against defendant.

Held, that this formed no ground for a new trial.

Wallace Nesbitt, for plaintiff.

Ermatinger, Q.C., for defendant.

Divisional Court.]

FLANNIGAN *v.* CANADIAN PACIFIC RAILWAY.

Railways—Dry grass on side of track—Fire therefrom—Liability of company.

During the summer of 1888, which was a very dry one, little rain having fallen, and none for some time prior to the fire in question, fires also having been frequent in that section of the country, the defendants allowed brush and long dry grass, which had been growing for two or three years, to remain on the side of the track adjoining the plaintiff's farm, while they had, the day previous to the fire, for the protection of their own property on the other side of the track, burnt up the dry grass, etc., there.

A spark from the defendants' engine having set fire to the dry grass, etc., adjoining the plaintiff's land, the fire extended into the plaintiff's land, and destroyed his fences, growing crops, etc. In an action against defendants, therefore, the jury found for the plaintiff.

Held, that the case was properly submitted to the jury, and could not be interfered with.

R. W. Scott and *Watson*, for plaintiffs.

W. Nesbitt and *Kidd*, for defendants.

ROSE, J.]

THE HAMILTON PROVIDENT LOAN AND INVESTMENT CO. *v.* SMITH.

Mortgage—Sale by mortgagor subject to mortgage—Further mortgage by purchaser—Lien

of mortgagor on land for amount of mortgage.

The defendant mortgaged certain land to the plaintiffs, covenanting to pay the mortgage money, and then sold to S., who assumed payment of the mortgage as part of the purchase money. S. then gave a second mortgage to the plaintiffs; and then further mortgaged the land. Default having been made, the plaintiffs sued defendant to recover the amount of his mortgage, and prayed for judgment for the whole amount mortgaged; but neither sale nor foreclosure was asked.

Held, that the plaintiffs were entitled to judgment on the covenant against defendant for the amount of his mortgage, but that defendant was entitled to a lien on the land for the amount of the mortgage as between him and S., which S. had bound himself to pay; and leave was given to defendant to amend and bring the proper parties before the Court so as to enforce his lien.

Muir, for plaintiff.

Creasor, Q.C., for defendant.

Div'l Ct.]

LAMPMAN *v.* CORPORATION OF GAINSBOROUGH.

Executors and Administrators—Action within six months by person beneficially entitled through death of intestate—Municipal corporations—Evidence of negligence—Contributory negligence.

An action for damages by reason of the death of a person can be maintained under R.S.O. ch. 135, sec. 7, by the persons beneficially entitled, though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased.

The action in this case was for damages sustained through the death of deceased by reason of the alleged neglect of defendants in allowing a highway to be out of repair. At the place in question the highway was connected by a bridge crossing a creek which had overflowed and had covered the bridge and embankments on either side with water to the depth of from 4 to 6 inches. The deceased, who was driving along the highway with a horse and wagon, in attempting to cross the bridge was thrown out of the wagon into the creek and killed. There was evidence of negligence on the defendants' part; and though contributory negligence was set up, it was merely inferential from the way the wagon went over the bridge and the position the horse and wagon were in after the accident. The jury found for the plaintiff.

Held, under the circumstances the Court could not interfere.

German, for plaintiff.

J. K. Kerr, Q.C., and *Aylesworth*, for defendants.

Divisional Court.]

REGINA *v.* STEWART.

Medical practitioners—Practising medicine—Evidence of—Costs.

The defendant attended a couple of sick persons, for which he received payment, but he neither prescribed nor administered any medicine nor gave any advice, his treatment consisting of merely sitting still and fixing his eyes on the patient.

Held, that this was not a practising of medicine contrary to the provisions of R.S.O. ch. 148, sec. 45, and a conviction therefore was consequently quashed and with costs as against the private prosecutor, as it appeared that he had a pecuniary interest in the conviction.

Hamilton Cassels, for applicant.

Osler, Q.C., contra.

Divisional Court.]

THE MAIL PRINTING CO. *v.* DEVLIN, *et al.*

Contract—Election to sue one of two persons—Evidence of.

The defendant D., after some correspondence with plaintiffs as to an advertising contract for the Union Medicine Co., had an interview with plaintiffs as to entering into same. A contract had been drawn up by the plaintiffs in expectation that it would be made by the company, but on ascertaining that the company was not incorporated, it was at plaintiffs' request signed by D., and the entry in plaintiffs' books was "G. A. Devlin, Toronto Union Medicine advertising contract." The first and second payments were made by

D., but on the third payment coming due, stated his desire not to make it, as it might prejudice a claim he had against G., his partner, with whom he had a dispute about the partnership affairs, whereupon plaintiffs saw G., and on his stating that it was D's business to pay their accounts, the plaintiffs sued D., and moved for judgment under Rule 80, stating in their affidavit in support of the motion that "the claim was under an agreement made between the parties, etc.," and that "the defendant," etc., "was and still is justly and truly indebted to the plaintiffs in respect of the matters above set forth." D. put in an affidavit in answer, in consequence of which G. was made a party defendant, and the case proceeded to trial.

Held, that on the evidence the credit under the contract was given to D. alone; but even treating D. as agent for an undisclosed principal, namely for G. as one of the firm, and therefore that G. might be jointly liable with D., the plaintiffs were bound to elect whether they looked to D. or the firm, and that there was a binding election not to treat the firm as liable, but to rely on the individual liability of D.

J. B. Clarke, for plaintiffs.

H. J. Scott, Q.C., and *Macpherson*, for defendants.

STREET, J.]

PRITCHARD *v.* PRITCHARD.

Action to recover land—Right to counter-claim without leave—Joining in counter-claim other cause of action with claim for land—Right to O.J.A. Rule 341.

To an action to recover possession of land it is a good cause of counter-claim that defendant was induced by his solicitor's fraud to make two notes for $1,000 each, which were then overdue and in plaintiff's hands, who took them with knowledge of fraud, and praying that plaintiff might be restrained from negotiating or parting with them and that they should be delivered up to be cancelled; for the fact of the notes being overdue in plaintiff's hands had not the effect of destroying the right to have them delivered up.

Held, also, that in an action for the recovery of land, the defendant can counter-claim without leave; but that he cannot in his counter-claim without leave under Rule 341, join another cause of action with a claim for the recovery of land.

C. J. Holman, for plaintiff.

Howard, contra.

Divisional Court.]

HARKINS *v.* DONEY.

Libel—Article in newspaper—Evidence of authorship—Refusal to answer as to authorship—Claiming privilege against criminal proceedings—Effect of.

In this action the libel consisted of a letter published in a Boston, U.S., newspaper, claimed to have been written by defendant. The letter stated that it was written in answer to an anonymous letter dated September 15th, published in the same newspaper, which the writer stated he had seen the manuscript of, and in which was a clumsy attempt to make the writer believe it was written further off than Ottawa, and he had also seen the manuscript of a letter written by an Ottawa shoe dealer to a Boston firm, and that the handwriting of both was the same. The anonymous letter referred to a trip made by defendant to New Brunswick, which was also referred to in the letter in question. The letter in question also spoke of the writer of the anonymous letter as a person who had come to Ottawa and opened up a boot and shoe business, and stayed at the same hotel as the writer of the letter in question. The letter also spoke of a certain machine called the crescent heel plate machine as our machine. The letter had the defendant's name subscribed to it. The defendant at the trial refused to answer whether or not he was the writer of the letter in question, claiming privilege on the ground that it might criminate him, and the publisher, for the examination of whom a commission issued, refused to be examined for the like reason. The defendant, on his examination, stated that both he and plaintiff were boot and shoe dealers in Ottawa, that he was a subscriber and correspondent to this newspaper, that he had been on a trip to New Brunswick, and on his return saw an anonymous letter of 15th September in this newspaper, as also the manu-

script thereof, as well as the manuscript of a letter to a Boston firm, both apparently in the same handwriting. The plaintiff's counsel stated that, in addition to the above, he intended proving that when plaintiff came to Ottawa he stopped at the same hotel as defendant, that defendant was the sole agent and vendor of the crescent heel plate machine.

Held, that this was sufficient evidence to go to the jury of defendant being the author of the letter in question.

Quaere, whether the refusal to answer the direct question as to authorship or the claim of privilege against criminal proceedings afforded any evidence thereof by way of admission or estoppel or otherwise.

McVetty (of Ottawa), for plaintiff.

Aylesworth, contra.

Divisional Court.]

REGINA *v.* WINEGARNER, *et al.*

Criminal law—Inquisition—Statement of holding inquest—Presentment under oath—Sealing—Identification of body—Constable acting as juror and witness.

The caption to an inquisition finding the prisoner guilty of murder, stated that the inquest was held at H. and C., on the 11th and 15th days of January, in the 51st year of the reign of Her Majesty Victoria; and the inquisition to be "an inquisition indented taken for our Sovereign Lady the Queen, etc., in view of the body of an infant child of A. W. (one of the prisoners), then and there lying and upon the oath of (giving the names of the jurymen), good and lawful men of the country duly chosen and who being then and there duly sworn and charged to enquire for our said Lady the Queen when, where, how and by what means the said female child came to her death, do upon their oath say," etc.

Held, that the statement of the time of holding the inquest was sufficient; that it sufficiently appeared that the presentment was under oath, and that it need not be under seal; that there was a sufficient finding of the place where the alleged murder was committed and of identification of the child murdered with that of the body of which the view was had.

L., the constable to whom the coroner delivered the summons for the jury, was at the inquest sworn in as one of the jurymen and was also sworn as a witness, and G., a juryman, was also sworn as a witness.

Held, that the fact of L. being such constable did not preclude him from being on the jury, or did either of such positions preclude him giving evidence as a witness, and so also G. Y. was not precluded.

A. S. Jones, for the applicant.

Dymond, contra.

Divisional Court.]

REGINA *v.* EDGAR.

Canada Temperance Act—Conviction without trial and in defendant's absence—Quashing.

The defendant was summoned to appear before the police magistrate of Lambton, on the 14th April, at 10.30, at the council chamber in the village of Forest, for unlawfully selling liquor under the Canada Temperance Act. The defendant being anxious, as he stated, to prevent the attendance of a number of witnesses on his behalf, instructed C., who was in his employment, to go to Watford, where the police magistrate resided, and try to arrange the matter with him so as to avoid a trial or the recording of a conviction by paying to such police magistrate such sum as he should demand. On the 13th April, C. went and saw the police magistrate, and in reply to C.'s enquiry as to what it would cost to settle the case, the police magistrate stated $50, which C. paid. At the same time C. signed an indorsement on the information in defendant's name as his agent, which stated that the written information had been read over to the defendant by the police magistrate and that the defendant pleaded guilty to same. Both C. and defendant stated that C. had no authority from defendant to sign anything, and that C. said he signed the paper without reading it or its being read to him. On 14th April the police magistrate, without holding any Court or calling any witnesses in support of the charge, and without defendant being present, convicted him of the offence charged and fined him $50 and costs, drawing up a formal conviction, which was returned on the same day to the clerk of the peace. Subsequently the police magistrate returned another conviction for the same offence, reciting that the conviction was made on the 14th April at F., by defendant admitting

the charge, etc. The police magistrate, as defendant stated, was not in F. nor did he hold any court there on that day.

Held, that there being no court held for the trial of the offence, and defendant not being present thereat in person or by attorney so as to make admission of guilt, and under the circumstances there should be no conviction for the offence charged, and the conviction was therefore quashed.

Aylesworth, for the applicant.

Delamere, contra.

Divisional Court.]

REGINA *v.* READ.

Quarter sessions—Appeal to, against conviction—Adjournment to following sessions—Endorsing on conviction—Necessity for.

An appeal from a conviction for malicious injury to property came on for hearing at the general sessions of the peace, when an adjournment was ordered to the next sessions. No order of adjournment was endorsed on the conviction, the clerk merely entering a minute of the order in his book. At the following sessions the appeal was heard and the conviction ordered to be quashed. *Held*, that the provisions in s. 7 of R. S. C., c. 178, as to endorsing the order of adjournment on the conviction were not imperative, but directory merely, and therefore the omission to make the indorsement did not affect the validity of the order to quash.

Mackenzie, Q.C., for applicant.

No one contra.

Divisional Court.]

BYRNE *v.* CORPORATION OF ROCHESTER.

Municipal corporations—Drainage—Compensation—s. s. 591-2.

B. was the owner of certain lands in the defendant's township, and was a petitioner with others for the construction of a drain. After the drain had been made B. claimed that he had sustained damages thereby, and an arbitration was had under the Municipal Act, and B, was awarded damages, the arbitrators holding that it would be necessary for B. to construct a bridge so as to cross from one part of his farm to another, to put in and maintain flood gates; and also that he had been deprived of the use of about three and a half acres of his land.

Held, that the case came within s.s. 591, 592 of the Municipal Act, and that B. was entitled to the damages awarded him, which must be assessed on the lands liable to assessment for the drainage work.

Douglas, Q.C., for the plaintiff.

Meredith, Q.C., contra.

Divisional Court.]

REGINA *v.* MAYBEE.

Canada Temperance Act—Absence of defendant—Service on wife—Evidence of lapse of reasonable time between service and hearing.

A summons was issued for selling liquor under the Canada Temperance Act, which was served by leaving it with the defendant's wife at the defendant's hotel. The defendant not appearing at the time and place mentioned in the summons for the hearing, and on the constable proving on oath the manner in which the summons had been served, the police magistrate proceeded *ex parte* to hear and determine the case, and convicted defendant of the offence charged, and imposed a fine. It appeared that the defendant was absent in the States as a witness in a trial there. There was no evidence that the wife was informed by the constable of the purport of the summons, and the defendant stated he knew nothing of the matter until four or five days after the conviction had been made, when he received a letter from his wife stating that some magistrates' papers had been left for him at the hotel.

Held, that under s. 39 of R.S.C. c. 178, in such case there must be evidence before the magistrate that a reasonable time has elapsed between the service of the summons and the day appointed for the hearing, and there being no such evidence here, the magistrate acted without jurisdiction and the conviction must be quashed.

Barber, for the applicant.

Langton, contra.

Divisional Court.]

COLVIN *v.* MCKAY.

Libel—Privilege—Excess of—Evidence of malice.

The plaintiff had been defendant's treasurer

from May, 1882, to Feburary, 1887, when by reason of the auditors' report of alleged defalcations by him the plaintiff was dismissed from his office. The auditors' report showed two sums not accounted for, namely, $1,400 and $132.32. Subsequently a commissioner was appointed by the Lieutenant-Governor to examine into the matter, and after doing so he ascertained that as to the $1,400, this was a mistake of the auditors, and on December, 1887, he made his report stating that all the township moneys were accounted for by defendant with the exception of the $132. 32, but having examined the plaintiff on oath at a meeting of the council at which defendant was present, the commissioner was satisfied with plaintiff's explanation as to $125 of this sum, namely, that it was interest on moneys of his own deposited with the township funds and so stated at the time, and made an addition to his report also so stating. In February following, the plaintiff wrote to a newspaper, stating that he was ready to pay over to the township any moneys either the council auditors or commissioner could show he owed, whereupon the defendant wrote to the paper, stating that the commissioner, apart from the mixing of moneys, had found plaintiff indebted to the township in the sum of $125, and that the plaintiff had made several thousand dollars out of the township, and could therefore well afford to pay his shortage and still have some thousands to the good. In an action for libel,

Held, that although the matter discussed in the defendant's letter was one in which defendant was interested as a ratepayer and member of the council, and might give rise to questions of qualified privilege, still it was for the jury to say whether under the circumstances the language employed in the letter was within the privilege or whether it was in excess of what the occasion justified, and if in excess, they could properly draw the inference of malice.

In this case the jury having found for the plaintiff, the Court refused to interfere.

Lash, Q.C., for the plaintiff.

McCarthy, Q.C., for the defendant.

Divisional Court.]

BLAKE *v.* CANADIAN PACIFIC R.W. Co.

Railways—Negligence—Ringing bell or sounding whistle—Contributory negligence.

In an action against defendants for an injury sustained by plaintiff by being run over by defendants' train at highway crossing, claiming that the statutory requirement as to ringing the bell or sounding the whistle had not been complied with,

Held, per ROSE and MACMAHON, JJ., that no negligence on defendants' part was shown, as the evidence disclosed that the statutory requirement had been complied with.

Per GALT, C. J., the plaintiff on the evidence was guilty of contributory negligence in not taking proper care in approaching the crossing.

Dr. Snelling, for the plaintiff.

G. T. Blackstock, for the defendants.

STREET J.]

HUNTINGDON *v.* ATTRILL.

Foreign judgment—Action for penalty.

The defendant was a shareholder and director of a joint stock company incorporated under the laws of the State of New York, having its head office in that State. The plaintiff, a creditor of the company for money loaned to the company, sued and recovered judgment against defendant for an alleged false certificate given by defendant while such director, as to the amount of paid up stock in the company, whereby as alleged the defendant, under certain statutes of the State of New York, became liable by way of penalty to all the debts of the company. In an action in this province on the judgment,

Held, that as the only cause of action which the plaintiff alleged was based on an offence committed by the defendant against the laws of New York State, and the only sum he sought to recover was the penalty fixed by the statute of the said State as the punishment for the offence, the judgment could not be recognized as creating a debt referable in this province.

Cattanach and *H. Symons*, for the plaintiff.

McCarthy, Q.C., and *A. R. Creelman*, for the defendant.

[FERGUSON, J.
Div'l Ct.

JAMES *v.* CITY OF LONDON INSURANCE CO.

Insurance—Over-valuation—Prior Insurance—Prior loss by fire—Ownership of goods—Warranty false and fraudulent representa-

tions—Removal of goods—Change of occupation—Proofs of loss—Sufficiency of—False swearing as to.

To a policy of insurance against fire on household furniture, etc., in a dwelling house at B., the defendants pleaded as a defence that by the application, which was made part of the policy, the plaintiff falsely and fraudulently represented as a warranty, amongst other things, that the furniture, etc., was of a named value; that there was no prior insurance, that the plaintiff had never sustained any loss by fire, and that plaintiff was the owner of the property destroyed, setting up a breach of a condition of policy.

The values of the furniture given in the application were proved to correspond with those contained in a book made up at the time the nsurance was effected, which was shown not to be extravagant, and no goods were shown to have been afterwards removed. The prior insurance referred to was effected while plaintiff was residing at M., where she resided before moving to B., but on going to reside at B. the present insurance was taken out under the belief that by the removal a new insurance was necessary, and it did not appear that the prior nsurance was then in force. There had been a prior loss by fire of about $10 through the overturning of an oil lamp or stove, thereby burning or injuring a piece of oilcloth, which being considered a small matter, was overlooked. While plaintiff was living at M., the furniture contained in the house occupied by her and her husband belonged to plaintiff. This was sold and the money derived therefrom received by the husband. Afterwards other furniture was purchased and again sold, the husband receiving the money. The husband also received certain moneys for plaintiff from the mother. Subsequently the furniture in question was purchased by the husband, and on the plaintiff moving to B. the furniture was taken there. The husband said that instead of paying back the money so received by him he had purchased the furniture for plaintiff, and both he and his wife said it was hers. There was no question as to the husband's solvency nor of any claim of creditors, and as to a marriage contract which was set up whereby the husband and wife were to have and enjoy their separate estates, the respective properties then or thereafter owned by them, no evidence was given as to its effect in the Province of Quebec or this province.

Held, that the contract contained no such warranty as alleged: and that the evidence failed to show any false and fraudulent representations as alleged; that though the statement as to previous loss by fire was technically untrue, it was in no sense false or fraudulent, and it was a question whether it came within the meaning of the condition, and that as regards the furniture it must be deemed to be the plaintiff's, though different considerations might arise had the husband been proved to have been insolvent, and the contention was with his creditors.

The defendants set up as a further defence that by a condition of the policy any change material to the risk, etc., avoided the policy, alleging the removal of part of the goods insured, and also a change of occupation and consequent increase of risk. The plaintiff having become ill, desired to consult the same medical practitioner who had attended her while at M., where she formerly resided, and for such purpose went with her children to her mother at M.—her husband remaining in the house—taking with her some little furniture and bed clothes. No claim was made for the property so removed, and the rest was not thereby affected.

He'd, that this defence failed.

The defendants also set up as a further defence that by another condition proofs of loss must be made by assured, and that they could only be made by an agent of insured when insured's absence or inability to make them was satisfactorily accounted for, and that the loss should not be payable until sixty days after completion of proofs.

The evidence showed that the proofs were not furnished by plaintiff in consequence of her illness, and that they were furnished by plaintiff's husband through a power of attorney from the plaintiff suggested by defendants. Proofs were furnished by the husband together with the power of attorney on the 24th November, which defendants acknowledged on the 26th. On December 10th, defendants wrote requiring invoices and vouchers, and on December 16th the husband wrote sending all the invoices and vouchers he was able to give. This was acknowledged on the 16th November, and

further invoices and vouchers asked for. The proofs in themselves were good and sufficient. Action was not brought until after 14th January.

Held, that this defence also failed; that the insured's absence and inability to furnish proofs was satisfactorily accounted for, and that the sixty days had expired before action brought, that the proofs must be deemed to have been completed on the 14th December, that proofs otherwise good and sufficient should not be considered as incomplete by reason of the failure to produce the further invoices and vouchers, the condition which referred to proofs merely stating that they are to be produced "if required and practicable."

The defendants further set up as a defence that there was, contrary to a condition of the policy, fraud and false swearing in the proofs of loss, but the evidence failed to establish it.

STREET, J.]

MURCHISON *v.* MURCHISON.

Marriage settlement—One of beneficiaries taking possession—Subsequent appointment as trustee—Title by possession.

On 25th July, 1853, J. M., by marriage settlement, conveyed with other property the Clyde hotel property in Toronto to trustees, to permit J.M. to receive the rents for his life, excepting a life annuity to his wife, and on his death subject to such annuity to pay annuities of £60 to each of his two daughters, S. M. and C. A. M., and subject thereto to divide the balance of the rents annually into three equal shares, and to apply one share to the support and education of the children of a deceased son, W. M. M.; another share to a son, R. D. M., and the third share to his daughter, F. E. C., with limitations over. On 27th March, 1860, by a chancery decree W. and O. were appointed trustees in the place of B. and P., and the trust estate was vested in them. J. M. died on 12th March, 1870. W. M. M.'s children all died in J. M.'s lifetime, and their said one-third share having thereby reverted to J. M., he disposed of same by his will. On May 10th, 1882, judgment of the High Court was pronounced, directing the removal of W., the surviving trustee, that an account be taken, and appointing R. D. M. and R. C. trustees; and also directing that all lands, etc., and all other assets, both real and personal, now vested in W. as such trustee, be vested in R. D. M. and R. C. upon the several trusts in the said settlement and will. On the death of J. M., R. D. M. had entered into possession of the Clyde Hotel property, and continued in such possession, receiving the rents to his own use without any question after the said judgment, and up to his death on 17th April, 1887. By his will and codicil, dated respectively 27th April, 1880, and 25th October, 1881, he devised to his executors his real estate, consisting of the Clyde Hotel property, upon trust, to pay the rents to his wife for life, and after her death to divide same equally among his children. In 1888, by three of his children, to have it declared that the Clyde Hotel was vested in R. C., the surviving trustee, under the trusts of the settlement, etc., and that an account should be taken.

Held, that the action could not be maintained, for that when R. D. M. took possession in 1870 he did not go in under the trustees, but adversely to them, and continued to so hold till his death; and the judgment of May, 1882, whereby R. D. M. was appointed one of the trustees, and trust estate vested in him could not be extended beyond its ordinary meaning so as to take away a property of which he had become the absolute owner and put it back into the trust estate.

Chancery Division.

ROBERTSON, J.] Jan. 25.

MALONE *v.* MALONE.

Dower—Demand—Damages—Parties—Costs—Devolution of Estates Act, R.S.O., 1887, c. 108.

M. M. made his will April 13th, 1888, devising his farm to his two sons; appointed the defendants executors, and died May 21st, 1888. In an action of dower by the widow of M. M. against the executors, in which they set up that the sons were the tenants of the freehold and should be made parties, it was

Held, that since the Devolution of Estates Act, R.S.O., 1887, c. 108, s. 4, the devisees were not necessary parties.

Held, also, that as no demand was made, although the plaintiff was entitled to judgment of *seisin*, it should be without costs, and as defendants were always ready and willing to assign the dower, plaintiff was not entitled to damages for detention.

Anglin, for the plaintiff.

Kappelle, for the defendants.

FERGUSON, J.] [Feb. 4.

Re ST. PHILLIP'S CHURCH AND THE GLASGOW & LONDON INSURANCE CO.

Insurance—Policy effected before R.S.O., 1887—Appraisement—Arbitration—Costs—R.S.O., 1877, c. 162; R.S.O., 1887, c. 167, s. 114.

St. Phillip's Church was insured with the Glasgow & London Insurance Co. under a three years' policy on November 14, 1885, and was destroyed by fire May 31st, 1888. The company admitted the loss, but asked the wardens to prove the damage, and an agreement for submission to appraisers was entered into by the wardens and the company, in which it was provided that "the award made by them (the appraisers), or any two of them, shall be binding upon both of said parties as to the amount of such damage to said insured property, but shall not determine any question touching the legal liability of said company," etc. Two of the appraisers joined in an award giving the wardens the full amount mentioned in the policy, and ordered the company to pay the costs of the reference and award. The company refused to pay any costs over and above half the arbitrators' fees.

Held [affirming the Master in Chambers], that R.S.O., 1887, c. 167, s. 114, was applicable to the policy in question, and that the Legislature intended by the use of the words "or otherwise in force in Ontario with respect to any property therein," that section to be applicable to all policies existing at the time the Act came into force, and that costs were properly awarded under sub-sec. 16 of that section.

Lockhart Gordon, for the churchwardens.

Geo. M. Rae, for the insurance company.

Div'l Ct.] [March 5.

MACDONELL *v.* BLAKE, *et al.*

Law Society—Retired judge—Ex officio bencher—R.S.O., 1877, c. 138, s. 4.

One who has been appointed a judge of one of the Superior Courts of Ontario, and has resigned before serving out fifteen years, and not being afflicted with some permanent infirmity disabling him from the due execution of his office, and resumed the active practice of his profession as a lawyer, is a retired judge within the meaning of R.S.O., 1877, c. 138, s. 4, so as to entitle him to act as an *ex officio* bencher of the Law Society.

James Reeve, for plaintiff.

Lount, Q.C., and *Reeve*, Q.C., for the Law Society.

H. Cassels, for defendant Blake.

Practice.

GALT, C.J.] March 27.

MACDONALD *v.* ANDERSON.

Reciver—Equitable execution—Rents—Restraint on anticipation.

Motion by the plaintiff for the appointment of a receiver to receive the rents of certain property held in trust for the defendant, a married woman, and the judgment debtor of the plaintiff. The property in question was vested in trustees to be held by them upon trust, at the request of the defendant, during her life: and afterwards, at their discretion, to sell the premises and to hold the moneys to arise from such sale upon trust to pay the income to the defendant during her life for her separate use independently of her present or any future husband, "and her receipts alone shall be sufficient discharges, and she shall not have power to deprive herself of any of the said principal money or of the income thereof by anticipation."

GALT, C.J.—It appears to me this case is concluded by the case of *Chapman* v. *Biggs*, 11 Q.B.D. 27. It is true, as argued by Mr. Shepley, that this application is for a receiver of the rents of the house, and that the house has not been sold; but if effect was given to such an argument the result might produce a serious loss and inconvenience to the defendant without in any degree benefiting the

plaintiff, as the defendant could at once request the trustee to sell the property.

Motion dismissed. No costs.

Shepley, for the plaintiff.

C. J. Holman, for the defendant.

GALT, C. J.] [March 28.

NELSON *v.* COCHRANE.

Parties—Action to charge annuity on land—Subsequent incumbrancer.

In an action for arrears of an annuity and to declare the same a charge on land, mortgagees of the land whose mortgage was subsequent to the will creating the charge and subject to the terms of it, were made defendants by the writ of summons; but on their own application immediately after delivery of statement of claim, their name was struck out with costs.

Masten, for the plaintiff.

E. B. Brown, for the Imperial Loan Company.

GALT, C. J.] [April 1.

In re ELLIOTT *v.* NORRIS.

Prohibition — Division Court — Territorial jurisdiction—Transcript to another Division Court after judgment.

A plaint was brought in the First Division Court of Middlesex upon a contract signed by the defendant, dated at London, to pay to the order of the plaintiffs at London, "$16 in wood delivered on the Hamilton & North Western Railway," which was not in Middlesex. The defendant resided in the County of Simcoe.

Held, that the Court in which the plaint was brought had no jurisdiction. The defendent filed a notice disputing the claim and the iurisdiction, but did not appear at the trial, and judgment was given against him. Subsequently a transcript of the judgment was transmitted to the Seventh Division Court of Simcoe.

Held, that the judgment did not thereby become a judgment of the Simcoe Court, and prohibition to the Middlesex Court was granted after such transmission.

J. B. Clarke, for plaintiffs.

T. M. Howard, for defendant.

FERGUSON, J.] [April 3.

CAMERON *v.* PHILLIPS.

Administrator ad litem—Rule 311—Security.

In a mortgage action in which foreclosure only was sought, it was stated that the lands were not equal in value to the mortgage debt. The mortgagor being dead and having left no estate whatever except the equity of redemption sought to be foreclosed, the executor named in the will of the mortgagor, which had not been offered for probate, was appointed administrator *ad litem* without security under Rule 311.

J. B. O'Brian, for the plaintiff.

BOYD, C.] [April 8.

HENDRICKS *v.* HENDRICKS,

Local master—Jurisdiction of—Rule 1187—Partition and administration—Taxed costs in lieu of commission.

Held, that a local master has no jurisdiction to make an order under Rule 1187, allowing the parties to an action or proceeding for administration and partition taxed costs instead of the commission provided for by the rule, "unless otherwise ordered by the Court or a Judge."

This was an action in which a judgment for partition and administration was pronounced by BOYD, C.

Held, that more especially in this case a local master had no power to interfere, for by ordering taxed costs instead of commission he was varying the judgment.

F. W. Harcourt, for the infant, defendants.

Langton, for the plaintiffs.

Hoyles and *W. H. Blake*, for the adult defendants.

BOYD, C.] [April 9.

HEATON *v.* MCKELLAR.

Joinder of parties—Action to set aside fraudulent conveyances—Several grantees.

Action by the plaintiff on behalf of himself and all other creditors of the defendant L., asking for judgment against L. upon two overdue promissory notes and seeking to obtain execution for such claim and also a previously recovered judgment against two several parcels of land, alleged to have been fraudulently co n

veyed to the other two defendants respectively. A motion was made to strike out the name of one or other of the alleged fraudulent grantees as improperly joined in the same action.

Held, that it was possible under the present practice to combine two such causes of action, which, if well founded, had a common root in the fraudulent transfer, and that there would be no practical inconvenience in trying both on the same record. The motion was therefore refused.

Chaput v. *Robert*, 14 A. R. 354, remarks of OSLER, J.. A., at pp. 361, 362, specially referred to.

Hoyles, for plaintiff.

Shepley, for defendant, McKellar.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk as the case may be), on conforming with clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher and pay $1 fee ; and on or before the day of presentation or examination file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

5. The Law Society Terms are as follows :—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, the affidavit attached to articles must state date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after admission on the books of the society as student or articled clerk.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term. Candidates for Certificates of Fitness are not required to give such notice.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

24. All notices may be extended once, if request is received prior to day of examination.

25. Printed questions put to Candidates at previous examinations are not issued.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, for 1889 and 1890.

Students-at-Law.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid B. V.
- Cæsar, B. G.d,I.) 33.)

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

Mathematics.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

English.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem :—
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

History and Geography.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy

and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek :—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1889—Lamartine, Christophe Colomb.
1890—Souvestre, Un Philosophe sous le toits.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography ; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition ; Smith's Manual of Common Law ; Smith's Manual of Equity ; Anson on Contracts ; the Act respecting the Court of Chancery ; the Canadian Statutes relating to Bills of Exchange and Promissory Notes ; and Cap. 123 Revised Statutes of Ontario, 1887, and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition ; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills ; Snell's Equity ; Broom's Common Law ; Williams on Personal Property ; O'Sullivan's Manual of Government in Canada, 2nd edition ; the Ontario Judicature Act ; R.S.O. 1887, cap. 44 , the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110, 143.

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For Certificate of Fitness.

Armour on Titles ; Taylor's Equity Jurisprudence ; Hawkins on Wills ; Smith's Mercantile Law ; Benjamin on Sales ; Smith on Contracts ; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons ; Pollock on Contracts ; Story's Equity Jurisprudence ; Theobald on Wills ; Harris's Principles of Criminal Law ; Broom's Common Law, Books III. and IV. ; Dart on Vendors and Purchasers : Best on Evidence ; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Michaelmas Term, 1888.

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ST. CATHARINES.

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Boys prepared for matriculation, with honors in all departments, in any University ; for entrance into the Royal Military College ; for entrance into the Learned Professions. There will be a special Commercial Department. Special attention paid to Physical Culture. Terms moderate. For particulars apply to the Secretary, 26 King St. E., Toronto.

FRED. J. STEWART, *Sec. Treas.*

The Canada Law Journal.

VOL. XXV. MAY 1, 1889. NO. 8

LIABILITY OF VALUERS FOR UNTRUE VALUATIONS.

THE liability of valuers for damages consequent on their making untrue valuations, may be founded either in contract or in tort. When the person who suffers damage by the false valuation is the person by whom the valuer was employed and paid, there is a privity of contract, and the valuer is bound to use reasonable skill and diligence, and if he fails in either he is guilty of a breach of his contract, and is responsible in damages to the person with whom he contracts. Cases, however, arise, when there is no privity of contract between the valuer and the person who sustains damage in consequence of trusting to his valuation. In such cases the valuer may have been paid by the person who reaps the benefit of his false valuation, or he may have acted gratuitously, but in either of these cases, as regards any third party injured by relying on his valuation, he is in the position of an unpaid valuer, and if liable at all, is liable only on the ground of tort.

It has been decided in the Courts of Ontario that in order successfully to maintain an action against an unpaid valuer for a false valuation, it is absolutely essential to establish *mala fides* on his part: *French* v. *Skead*, 24 Gr. 179. In this case an unpaid valuer valued property for the purpose of the plaintiff making a loan of money upon it, at $1,200, when in fact it was not worth more than $400 or $500, and actually realized only $130 at a sale under execution. But the Court of Chancery nevertheless absolved the valuer from liability, because there was no evidence of *mala fides*, and this decision was affirmed by the Court of Appeal: see 24 Gr. 413. Spragge, C., however, dissented, and considered the defendant had been guilty of such gross negligence as to render himself liable; an opinion in which we are inclined to agree, and which we think will be found to be sustained by the later cases to which we shall presently refer.

This decision was followed in *Silverthorn* v. *Hunter*, 26 Gr. 390; 5 App. R. 157, but whether that was the case of a paid, or an unpaid valuer, seems open to doubt. One, McLellan, at the plaintiff's request, procured the valuation and paid the defendant, Hunter, $4 for his services, but Burton, J.A., in *Canada Landed Credit Co.* v. *Thompson*, says the head note of *Silverthorn* v. *Hunter* is misleading, and that "in that case Hunter was not acting as the paid agent of the plaintiff." . . . "The defendant in that case was paid for his services by the witness McLellan, but it was not pretended that he was the paid agent of the plaintiff." But, however that fact may be, the defendant, Hunter, valued the property in question at $2,000; but through the fraud of McLellan, who procured the valuation at the plaintiff's request, he actually signed a certificate whereby he certified

and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek :—

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It has been decided in the Courts of Ontario that in order successfully to maintain an action against an unpaid valuer for a false valuation, it is absolutely essential to establish *mala fides* on his part: *French* v. *Skead*, 24 Gr. 179. In this case an unpaid valuer valued property for the purpose of the plaintiff making a loan of money upon it, at $1,200, when in fact it was not worth more than $400 or $500, and actually realized only $130 at a sale under execution. But the Court of Chancery nevertheless absolved the valuer from liability, because there was no evidence of *mala fides*, and this decision was affirmed by the Court of Appeal: see 24 Gr. 413. Spragge, C., however, dissented, and considered the defendant had been guilty of such gross negligence as to render himself liable; an opinion in which we are inclined to agree, and which we think will be found to be sustained by the later cases to which we shall presently refer.

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fully maintained against an unpaid valuer except on proof of fraud, unless the litigant is prepared to carry his case to the Supreme Court.

When the valuer is not informed and does not know that his valuation is procured for the purpose of being acted on, or inducing some other person to act on it, it would seem that according to the principles on which *Moffatt* v. *Bank of Upper Canada*, 5 Gr. 374, and *Cook* v. *Royal Canadian Bank*, 20 Gr. 1, were decided, that he would not be liable in damages, should his valuation prove untrue. These were not cases of valuation, it is true, but cases in which persons dealing with mortgagors sought to hold the mortgagees liable for representations made in respect to the amount due on the mortgage; and it was held that the representations relied on not having been made with notice of any intention to act upon them in dealing with the owner of the equity redemption, they did not estop the mortgagee from disputing their correctness.

Before concluding, we may observe that the amount of skill and judgment required to be exercised by a paid or unpaid valuer in making a valuation, to some extent depends on whether or not he holds himself out to the world as a valuer by occupation, for while in the one case he will be liable for loss if he fails to exercise the skill and judgment which a professional valuer may be reasonably expected to possess, in the other case he will not be liable unless he has been guilty of gross negligence or fraud. This distinction is pointed out by Spragge, C., in *Hamilton Provident & Loan Society* v. *Bell*, 29 Gr. 203. That case was determined on a hearing *pro confesso*, but the judgment is a considered judgment. The case was one of a paid valuer, but the principle on which the learned judge based his decision of the case appears equally applicable to unpaid valuers. He cites with approval the following passages from Evans, Principal and Agent, p. 238, viz.: "An agent is liable for misfeasance in performing a gratuitous undertaking, if he fails to exercise that degree of skill which is imputable to his situation or employment. Any failure on his part to fulfil the obligation imposed upon him as being possessed of the skill which he holds himself out to the world as possessing, is actionable negligence;" and again: "Lord Loughbrough agreed with Sir *William Jones* (Law of Bailments, p. 120) that when a bailee undertakes to perform a gratuitous act from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. His Lordship acknowledged, too, that if in this case (*Shields* v. *Blackburn*, 1 H. Bl. 158) a ship broker or a clerk in a custom house had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries, but when an application, under the circumstances of this case, is made to a general merchant to make an entry at the custom house, such a mistake as this is not to be imputed to him as gross negligence." These principles Spragge, C., held were applicable to the case of persons employed to act as valuers.

The mere fact that after the valuation, the property depreciates in value,

cannot, of course, render a valuer liable. The sole question must be whether the valuation was correct, at the time it was made, for it is impossible to render a valuer liable for any subsequent depreciation which could not, by the exercise of reasonable judgment, have been foreseen—and where a valuer gives a conditional valuation, the conditions must have been complied with, before he can be made liable. Thus, where a paid valuer gave a valuation for the purpose of a loan, in which he said, "the houses are unfinished, and my valuation of $4,980 is on the supposition that they will be finished in a manner similar to those adjoining; a final inspection should, I think, be made," and the houses were not finished, as contemplated by the certificate, and no final inspection was made, but the money was advanced; and afterwards the property very seriously depreciated in value, and only realized $1,800—it was held that the valuer was not liable.

In the recent case of *O'Sullivan* v. *Lake*, 15 O.R. 544, it has been held by the Common Pleas Division, (Galt, C.J., dissenting), that it is not negligence on the part of a paid valuer to rely on his own judgment entirely, and that his omission to inquire of other persons as to the value of land in the neighborhood cannot be imputed to him as negligence. But all the judges agreed that the omission to inquire as to previous sales afforded evidence of negligence on the part of a paid valuer; and if there have been no sales, and property has not changed hands in the locality for a lengthened period, it appears also to be the duty of such a valuer to inquire and ascertain the cause, with a view to ascertaining whether the neighborhood is objectionable, or for any other cause property is unsaleable. This case, we believe, has been carried to the Court of Appeal.

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE Law Reports for March comprise 22 Q.B.D., pp. 237-393; 14 P.D., pp. 25-41, and 40 Chy. D., pp. 213-385.

PRINCIPAL AND AGENT—INDEMNITY—STOCK EXCHANGE, USAGE OF—DEFAULTING BROKER.

In the Queen's Bench Division the first case we find calling for attention is *Harlas* v. *Ribbons*, 22 Q.B.D. 254. The action was brought by the plaintiff, a stockbroker, against his client, to compel the latter to indemnify him against a liability he had incurred in respect of shares bought for the defendant under the following circumstances: The plaintiff was a broker on the Stock Exchange, employed by the defendant to purchase shares, which he did. Before the settling day the plaintiff became a defaulter on the Stock Exchange, and in accordance with the rules of the Exchange, the accounts which were open against him were closed as between himself and the jobbers at the then current prices as fixed by the official assignee of the Stock Exchange. The account in respect of the shares bought for the defendant when closed in this way, showed a balance in favor of

the jobbers against the plaintiff; but according to the practice of the Stock Exchange, such closing of the account does not affect the client, if he desires to have the contract completed, and is not in default to the defaulting broker, and the jobber in that case is bound to complete on the settling day. Later on the same day the plaintiff was declared a defaulter. The plaintiff informed the defendant that he had been declared a defaulter on the Stock Exchange and his accounts closed, and that the defendant could either accept the prices fixed by the official assignee, or, if he desired, he could take the shares up, that is, pay for them on the settling day. The plaintiff said he would accept the official prices; and it was held by the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) that the defendant having ratified the closing of the account before the settling day, was bound to indemnify the plaintiff against the amount for which the plaintiff was liable to the jobbers on the closing of the account.

PRACTICE—CAUSE SET DOWN FOR TRIAL—CHANGE OF SOLICITOR—NOTICE TO OFFICER—ORD. 7, R. 3 (C.R. 463).

Hunt v. *Fineburg*, 22 Q.B.D. 259, shows the serious consequences which may result from not giving proper notice of a change of solicitor. After the cause was set down for trial the plaintiff's solicitor was suspended from practice; thereupon the plaintiff changed his solicitor, and notice of such change was filed at the central office, but no notice was given to the officer with whom the record was entered for trial. The case came on for trial, and the learned judge presiding, finding the name of a solicitor on the record who had been suspended from practice, and there being no evidence before him of any change of solicitor, declined to hear the case and dismissed the action with costs. This order was subsequently varied by the Divisional Court and the cause reinstated on the terms of the plaintiff paying all costs which had been thrown away, and this order was sustained by the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.), who overruled the plaintiff's contention that he was entitled to have the cause reinstated without any terms.

PRACTICE—PRODUCTION OF DOCUMENTS IN HANDS OF THIRD PARTIES—ORD. 37, R. 7—(SEE C.R. 578, 579, 580).

In *Starker* v. *Reynolds*, 22 Q.B.D. 262, a Divisional Court (Huddleston, B., and Wills, J.) decided that under Ord. 37, r. 7, which provides: "The Court or judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order which the Court or judge may think fit to be produced: provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial," the Court has no power to make an order upon a person not a party to the action to produce documents for the purpose of enabling a party to the action to inspect the same before trial. The Ontario

Rules are not exactly in the same words, but C.R. 578-580, which deal in effect with the same branch of practice, would no doubt receive a similar construction. The effect of the decision is to limit the operation of the Rules above referred to, to the case of third parties called as witnesses to give evidence upon interlocutory motions, and not to permit them to be used for the purpose of obtaining discovery or inspection of documents in the hands of third parties. Wills, J., says at p. 265: "In my opinion the rule was intended by those who framed it to be strictly construed, and I think it gives the Court or a judge power to order the production of documents for the purpose of the preliminary examination of witnesses before the trial, but does not give the Court or a judge power to order inspection, properly so called, before the trial, of documents in the hands of persons who are not parties to the action."

PRACTICE—TIME—DELIVERY OF PLEADINGS—COUNTER CLAIM—REPLY—ORDS. 19, R. 2; 21, R. 6; 23, RR. 1, 4 (C.R 380, 381).

Rumley v. *Winn*, 22 Q.B.D. 265, is a case which shows that where a defendant delivers both a statement of defence and a counter claim, the plaintiff has twenty-one days to deliver and reply to the defence and counter claim under Ord. 23, r. 1 (C.R. 381), notwithstanding that if a counter claim alone had been pleaded the plaintiff must, under Ord. 21, r. 6 (C.R. 380), have delivered his defence thereto within the same time as is allowed for delivering a defence to a statement of claim.

PRACTICE—APPEAL—LEAVE TO APPEAL—APPEAL FROM DECISION REFUSING LEAVE TO APPEAL.

In *Kay* v. *Briggs*, 21 Q.B.D. 343, the Court of Appeal (Lord Esher, M.R., and Fry, L.J.) held that where a Divisional Court refused leave to appeal from their decision given in an appeal from a County Court, no appeal would lie to the Court of Appeal from the refusal to grant such leave.

SALE OF GOODS—MEMORANDUM IN WRITING—STATUTE OF FRAUDS (29 CAR. 2, C. 3), S. 17.

Lucas v. *Dixon*, 22 Q.B.D. 357, was an action brought to recover damages for the non-acceptance of goods on a contract coming within sec. 17 of the Statute of Frauds. At the trial the plaintiff put in an affidavit made by the defendant in the course of the action, as being a note in writing sufficient to satisfy the statute. Stephen, J., though of opinion that the affidavit sufficiently proved the contract, nevertheless rejected the evidence because the affidavit was not in existence at the commencement of the action, and this decision was upheld by the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) Fry, L.J., says, at p. 363: "The statute requires the memorandum as evidence, but requires that evidence to be in existence at the commencement of the action which is brought to enforce the contract. If, then, it only comes into existence after the commencement of such an action, and the plaintiff desires to avail himself of it, he can only do so by discontinuing the action and commencing another.

BUILDING SOCIETY—MORTGAGE—REDEMPTION—ALTERATION OF RULES AFTER DATE OF MORTGAGE.

Rosenberg v. *Northumberland Building Society*, 22 Q.B.D. 373, was an action for redemption of a mortgaged estate, in which the dispute between the parties was as to the terms on which the plaintiff was entitled to redeem. The mortgage contained a covenant by the plaintiff to pay to the defendants all subscriptions, fines and other moneys, which, according to the rules for the time being of the society, should from time to time become due and payable by him in respect of the security or the shares by virtue of which the advance was made to him. And the proviso for redemption was in similar terms. The rules in force at the date of the mortgage did not render members borrowing from the society liable to contribute to the losses of the society. But the rules were subsequently altered imposing this liability. The question therefore, was, whether the plaintiff was bound by this alteration in the rules, and the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.) overruling Day, J., held that he was so bound.

NUISANCE—HEAP OF EARTH NEAR HIGHWAY—EVIDENCE.

Brown v. *Eastern and Midlands Ry. Co.*, 22 Q.B.D. 391, was an action to recover against the defendants damages for negligence in allowing a heap of earth and refuse to remain on their premises near the highway, whereby the plaintiff's horse was frightened and upset the cart it was drawing, injuring the plaintiff thereby. At the trial the plaintiff tendered evidence of other horses having shied at the heap. Pollock, B., at the trial rejected the evidence and non-suited the plaintiff, but the Divisional Court (Denman and Stephen, JJ.), set aside the non-suit and granted a new trial, holding if the heap was of such a nature as to be dangerous by causing horses passing on the highway to shy, it was a public nuisance, and that the evidence showed that the heap was likely to cause horses to shy, and was therefore admissible. This decision was affirmed by the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.)

None of the cases in the Probate Division call for any notice here.

LEGITIMACY—ILLEGITIMATE CHILD—SUBSEQUENT MARRIAGE OF PARENTS—LEGITIMATION OF CHILD—INTERVENING MARRIAGE OF FATHER WITH ANOTHER WOMAN—DOMICIL.

Proceeding now to the cases in the Chancery Division, *In re Grove, Vaucher* v. *The Solicitor of the Treasury*, 40 Chy. D. 216, is the first which calls for notice. The action was brought for the administration of the estate of Caroline E. Grove, a domiciled Englishwoman, who died on 29th Oct., 1866, at the age of 88, a lunatic and intestate, and possessed of considerable property. Two families claimed to be her next of kin, the Vaucher family and Falquet family, and both claimed through the grandfather of the intestate, Marc Thomegay, and the same woman, Martha Powis, under the following circumstances :—Marc Thomegay was born in Geneva, of Swiss parents, in 1712, his domicil of origin being Genevese. In 1728 he was received as a burgess of Geneva, and in 1729 his father died in Geneva. In 1734 Marc went to England and resided there until his death in 1779. Some time

after his arrival there he formed a connection with an Englishwoman, Martha Powis, by whom he had three illegitimate children—Sarah, born 5th Feb., 1744, a son born 11th Feb., 1745, and another daughter born 14th Nov., 1747—who were all baptized shortly after birth under their father's name and as his children. Sarah married, and was the ancestress of the Vaucher family. On 22nd May, 1749, Marc Thomegay married an Englishwoman named Elizabeth Woodhouse; of this marriage one child was born, who was the parent of Caroline E. Grove, the intestate. Elizabeth Woodhouse died 26th March, 1752, and on 2nd Feb., 1755, Marc married Martha Powis, by whom he had previously had the three illegitimate children above mentioned, and by this marriage he had four children, only one of whom left issue, and she was the ancestress of the Falquet family. In 1773 a special Act of Parliament was passed naturalising several foreigners, among them Marc's brother, but not himself. Martha Powis died in 1772. In the year 1774, Marc Thomegay presented a petition to the Council of Geneva, apparently in the interest of his three illegitimate children, in which he stated his illicit intercourse with Martha Powis and the birth of three children, that his intention to marry her was thwarted, and he married Miss Woodhouse, and her death and his subsequent marriage with Martha Powis. The petition further stated that the petitioner was informed that according to the laws of Geneva, his native country, subsequent marriage legitimized illegitimate-born children, and praying that the Council might grant him record of his proofs, etc., so that no one might question the legitimacy of his three children in Geneva, his native country. An order was granted by the Council granting record accordingly. Marc Thomegay made his will in English form in 1779, describing himself as of Tottenham, in the County of Middlesex, and died the same year. According to the laws of Geneva, children born out of wedlock were legitimated by the subsequent marriage of their parents. In order to determine the conflicting claims of the parties therefore, it became necessary to determine the domicil of Marc Thomegay at the time of his marriage with Martha Powis. Stirling, J., held that his domicil at the time of his marriage with Martha Powis was English, and therefore that the descendants of Sarah were not entitled to inherit as next of kin, and this decision was affirmed by the Court of Appeal (Cotton, Fry and Lopes, L.JJ.), who were of opinion that the whole evidence showed that Marc had come to England with the intention of changing his domicil, and that the Act of Parliament and the petition to the Geneva Council did not displace this evidence. As Lopes, L.J., observed, the non-naturalisation of Marc, while it indicated a wish to preserve his nationality, in no way disproved his having an English domicil. And Cotton, L.J., says at p. 232: "What is really necessary, I think, is that the father should at the time of the birth of the child be domiciled in a country allowing legitimation, so as to give to the child the capacity of being made legitimate by a subsequent marriage. But it is the subsequent marriage which gives the legitimacy to a child who has, at its birth, in consequence of its father's domicil, the capacity of being made legitimate by a subsequent marriage." And on the next page he says: "In my opinion the domicil must give a capacity to the child of being made legitimate, but then the domicil at the time of the marriage,

which gives the status, must be domicil in a country which attributes to marriage that effect."

PRACTICE—COSTS—TAXATION—COSTS PAYABLE OUT OF ESTATE.

In *Brown* v. *Burdett*, 40 Chy. D. 244, Kay, J., adopted the somewhat unusual course of refusing to allow to trustees as against an estate their taxed costs, and directed such sum only to be allowed as the taxing officer considered would have been a reasonable compensation had the proceedings been duly conducted without any unnecessary delay. The circumstances calling for this exercise of jurisdiction were, that on the hearing of the action on further directions, it appeared that it was one for administration which had been commenced in 1875, and had consequently been pending about fourteen years; that gross delay had characterized the conduct of the cause; that the estate was worth about £4,000, and that the whole of it nearly was required to pay the taxed costs. In adopting the course he did, Kay, J., laid down two principles: "1. The Court will not permit the costs occasioned by improper litigation, or by the negligent conduct of administration proceedings, to be paid out of an estate under its care. 2. The amount of costs allowed by a taxing master as between the client and his solicitor, is not conclusive of the amount which the Court will allow out of the estate," and these principles were approved by the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.), who affirmed his decision.

RAILWAY COMPANY—DISPUTED INTEREST—INJUNCTION—JURISDICTION.

In *Birmingham & District Land Co.* v. *London & N.-W. Ry. Co.*, 40 Chy. D. 268, the plaintiffs were in possession of land under a binding agreement, determinable if the buildings were not completed by 30th November, 1885. They were informed in 1880 of the promotion of a bill for a railway which would affect the lands, and they thereupon had an interview with the agent of the landlord, who told them to suspend building operations till the result of the railway scheme was known, but no express agreement was made for the extension of the time for building. In 1883 the defendant company obtained their Act, and on the 31st July, 1883, purchased from the landlord such part of the land as was required, subject to the building agreement. On the 16th September, 1884, the defendants sent the plaintiffs notice to treat. The plaintiffs sent in no claim, and in January, 1886, the defendants took possession without making a deposit or giving any bond as required by the Railway Act; thereupon the plaintiffs brought the present action for an injunction, and to have it declared that the building agreement was subsisting, and that they were entitled to have their interest assessed on that footing, The action was resisted by the defendants on the ground that the plaintiff should have proceeded under the Railway Act to get compensation; and, second, that the plaintiffs' interest under the agreement had expired. But the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) affirming, Kekewich, J., held that as the defendants had, without complying with

the Railway Act, entered upon the land of which the plaintiffs were lawfully in possession, the action would lie, and that it was competent for the Court to make a declaration of the plaintiffs' title; and that although the term named in the agreement had expired, yet that the agent's direction to suspend building raised an equity in their favor against the landlord to prevent his ejecting the plaintiffs at the end of the term, until they had a reasonable time after notice to complete the building, and that the railway company took subject to that liability.

WARD OF COURT—MARRIAGE OF WARD WITHOUT LEAVE OF COURT—SETTLEMENT—INFANTS' SETTLEMENTS ACT (18 & 19 VICT., c. 43)—R.S.O., c. 44, s. 32.

In re Leigh Leigh v. *Leigh*, 40 Chy. D. 290, the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) determined that where a male infant ward of Court had married without the leave of the Court, the Court had no power under the Infants' Settlement Act to compel him to execute a marriage settlement of his property. In this case the plaintiff while an infant ward of Court had married without leave, and fearing he would get into trouble and that his allowance for maintenance might be suspended, executed under the direction of the Court a settlement of his property. The present application was made by him on his attaining his majority by way of appeal from the order directing the settlement, and to cancel the settlement made thereunder; the Court being unanimously of opinion that the Infants' Settlement Act gives the Court no power to compel an infant to execute a settlement of his property against his will.

UNFAIR DEALING—PURCHASE OF REVERSIONARY INTEREST—SALE—UNDERVALUE—31 VICT., C. 4 (R.S.O., c. 100, s. 35).

In *Fry* v. *Lane*, 40 Chy. D. 312, Kay, J., set aside a purchase of a reversionary interest from a poor, ignorant man, having no independent advice, and the sale being made at a considerable undervalue, holding that the circumstance of the vendor being poor and ignorant and without independent advice, cast the onus on the purchaser of showing that the transaction was fair, just and reasonable. It appeared that the same solicitor had acted for both parties, but the learned judge found that he was more concerned to get a good bargain for the purchaser than to protect the interest of the vendors. Respecting this aspect of the case, Kay, J., observes at p. 323: "The most experienced solicitor, acting for both sides, if he allows a sale at an undervalue, can hardly have performed his duty to the vendor. To act for both sides in such a case, and permit a sale at an undervalue, is a position in which no careful practitioner would allow himself to be placed." The Imperial Statute, 31 Vict., c. 4, from which R.S.O., c. 100, s. 35, is taken, provides that "no purchase made *bonâ fide* without fraud or unfair dealing of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of undervalue," was held not to prevent the Court from setting aside the transaction, "where the undervalue is so gross as to amount of itself to evidence of fraud"; and yet it may be observed the purchaser in this case was

acquitted by the judge of any moral fraud, but found guilty only of unfair dealing, "which Equity considers a fraud." It may be well to notice that the words "unfair dealing" are omitted in R.S.O., c. 100, s. 35.

COPYRIGHT—PHOTOGRAPH—IMPLIED CONTRACT—BREACH OF FAITH—INJUNCTION.

Pollard v. *Photographic Company*, 40 Chy. D. 345, was a novel kind of action. The plaintiff had been to the defendant to have her likeness taken by photograph. From the negative so taken the defendant constructed a Christmas card which he exhibited in his shop and offered for sale. There was no copyright registered of the photograph. The action was brought to restrain the defendant from offering for sale, or exposing by way of advertisement or otherwise, the photograph of the plaintiff, and North, J., granted the injunction, holding that a photographer who takes a negative likeness of a lady customer in order to supply her with copies for money, may be restrained both from selling or exhibiting copies, both on the ground that there is an implied contract not to use the negative for such purposes, and also on the ground that such sale or exhibition is a breach of confidence.

CONDITION—DEBENTURE—TIME AND PLACE OF PAYMENT.

Thorn v. *City Rice Mills*, 40 Chy. D. 357, was an action to recover the amount due on a debenture. By the debenture the principal sum was payable at a future date, and interest was payable thereon half yearly, subject to conditions that if default should be made for fourteen days in payment of the interest, the principal should be immediately payable, and that principal and interest should be payable at one of two places. A half year's interest was not paid within fourteen days of the time appointed, but the plaintiff did not appear at either place at the time named for payment. The company offered to pay the interest in default, but the plaintiff claimed to recover the principal also by reason of the default. But it was held by North, J., that no demand having been made by the plaintiff at either of the places named for payment, there had been no default, and consequently that the plaintiff was not entitled to recover the principal money as he claimed.

TRUSTEE, PAYMENTS MADE BY, FOR COSTS— BREACH OF TRUST—CLAIM TO HAVE COSTS PAID REFUNDED TO ESTATE.

In re Blundell Blundell v. *Blundell*, 40 Chy. D., 370, a question arose as to whether a solicitor whom a defaulting trustee had suffered to retain money out of the trust estate for costs, could be ordered to refund it to the estate on the ground that the trustee was in default to the trust estate. In this case at the time the trustee allowed his solicitors to retain costs out of the trust estate, the solicitors had notice that the trustee had committed a breach of trust in secretly buying for himself part of the trust estate. The action was for administration of the trust, and the

trustee having made default in paying into Court the balance fund against him, an application was made against the solicitors to compel them to refund the costs they had so retained; but it was held by Stirling, J., that in order that a solicitor of a trustee may be debarred from accepting payments out of the trust estate in respects of costs properly incurred, notice must be brought home to him that at the time when he accepted them the trustee had been guilty of a breach of trust such as would preclude him from resorting to the trust estate for payment of his costs, and that the breach of trust of which the solicitors had notice was not necessarily such a one as would disentitle the trustee to be indemnified for his costs properly incurred out of the estate.

Notes on Exchanges and Legal Scrap Book.

PUNISHING THE JUDGES.—If we may believe the author of the "Mirror of Justices," who is said to have written in the reign of Edward I., there were almost as many judges as malefactors hanged in the time of Alfred. That active monarch ordained that all false judges, after forfeiting their possessions, "should be delivered over to false Lucifer, so low that they never return again; that their bodies should be banished, and punished at the king's pleasure; and that for a mortal false judgment they should be hanged as other murderers." That this denunciation was not merely *brutum fulmen* appears from a list, given by the same author, of the judges executed by the king's order. In one year we are told that forty-four justices were hanged. "He hanged Cole, because he judged Ive to death when he was a madman. He hanged Athulf, because he caused Copping to be hanged before the age of one-and-twenty years. He hanged Dilling, because he caused Eldon to be hanged, who killed a man by misfortune. He hanged Horne, because he hanged Simin at days forbidden." A judge at this time could hardly escape with life or limb; for, not content with hanging, Alfred maimed his judges for not maiming their prisoners. Thus, we are told, he cut off the hand of Haulf, because he saved Armock's hand, who was attainted before him, for that he had feloniously wounded Richbold; and he judged Edulfe to be wounded, because the latter judged not Arnold to be wounded, who feloniously had wounded Aldens."—*The Green Bag.*

DIARY FOR MAY.

1. Wed.....St. Philip and St. James.
2. Thur.....Admission of graduates and matriculants. J. A. Boyd 4th Chan., 1881.
3. Fri.....Mr. Justice Henry, died 3rd May, 1888.
4. Sat. .....Last day for filing paper and fees for final examination.
5. Sun .....*Second Sunday after Easter.*
6. Mon.....Supreme Court of Canada sits. 1st Intermediate Exam. Lord Brougham died 1868, aet. 90.
9. Thur. ...2nd Intermediate Examination.
12. Sun .....*Third Sunday after Easter.*
14. Tue .....Court of Appeal sits. Gen. Sess. and Co. Ct. Sitt. for trial in York begin. Solicitors' Examination.
15. Wed.....Barristers' Examination.
19. Sun .....*Fourth Sunday after Easter.*
20. Mon .....Easter Term commencs. High Court Justice Sittings begin.
21. Tue .....Confederation proclaimed 1867. Lord Lyndhurst born 1772.
24. Fri.....Queen Victoria born 1819.
26. Sun .....*Rogation Sunday.*
27. Mon .....Habeas Corpus Act passed 1679.
28. Tue .....Battle of Fort George 1813.
30. Thur. ...Ascension Day.

Reports.

ONTARIO.

HIGH COURT OF JUSTICE.

[Reported for the CANADA LAW JOURNAL.]

Re CENTRAL BANK OF CANADA.

Winding-up Act, R.S.C., c. 129—Impeaching bank charter and treasury certificate—Bank trafficking in shares, or reducing its capital—Shareholders by estoppel—Defences after winding-up order.

An Act incorporating a bank, and providing that the Act shall be in force until 1891, continues the legal vitality of the corporation until then, subject to its complying with the preliminary conditions as to its commencing banking business.

The certificate of the Treasury Board authorizing a bank to commence its business, is conclusive evidence that all the conditions of its charter have been complied with.

Persons who acquire shares in a bank, and attend meetings and receive dividends, and are recognized by the bank as shareholders, are estopped from impeaching the validity of the charter or treasury certificate, or that their shares never had a lawful existence, or were held under an unlawful trust, or were affected by other infirmities of title.

A person may become a shareholder without signing the stock book, or any written agreement to take shares; and the bank and a shareholder may waive the statutory condition requiring payment of ten per cent. within thirty days of the subscription for shares.

Directors subscribing for shares to enable the bank to go into operation, cannot relieve themselves from liability respecting such shares by declaring them to be "trust shares," and that no calls are to be payable on such shares; nor can the transferees of such shares, after a winding-up order, contend that by the directors so acting the bank was trafficking in its own shares, or that the shares were invalid, or that such transferees never became shareholders in the bank.

A cashier of a bank cannot use the bank's funds to purchase for the bank its own shares, as such a purchase, (1) if for the purpose of re-selling the shares, is prohibited by the Bank Act; or (2) if for the purpose of returning the money to the shareholders, would operate as a reduction of the bank's capital without the authority of law.

Where a transferror who is not at the time of transfer the owner of the specified number of shares, but who subsequently obtains and registers sufficient shares to make up the specified number, and the bank registers the transfer and pays, and the transferee receives, dividends on such specified number of shares, the bank and the transferee are estopped from contending that the specified number of shares did not pass to such transferee.

Semble: A bank having unissued shares may in such a case, recognize the transfer as conveying the shares actually held by the transferror, and may supplement out of its unissued shares sufficient to make up the specified number.

After a winding-up order there are only creditors and contributories before the Court, and no corporation; and shareholders cannot then raise defences which would be available against the corporation, as rescission of the contract respecting the shares is then impossible.

[TORONTO, June 29, 1888.

This was a proceeding before the Master-in-Ordinary under the Dominion Winding-up Act, R.S.C., c. 129, to settle a list of contributories. The bank had been declared insolvent by an order of Court, and three liquidators had been appointed to wind up its affairs. The material facts and the defences raised by the contributories are stated in the judgment.

MR. HODGINS, Q.C., MASTER-IN-ORDINARY: The evidence in this case has disclosed so many irregular, if not unlawful, transactions in the organization and management of this bank, as to have induced the shareholders to seek out and build up all possible defences against their liability for the corporate debts of the bank. Had the shareholders who now complain investigated the subscription for and transfer of the shares before acquiring them, they might have avoided the disasters in which they now find themselves involved. In taking the chances of gains on their purchase of shares they took also the risk of a total loss, and they are now learning the hard

lesson that as between the hardship of their present unfortunate position and the rights and equities of creditors, the Court can find no law to relieve them of the liability placed upon them by the Bank Act.

The bank in question was incorporated on the 23rd May, 1883 (46 Vict., c. 50); it commenced business about the end of February, 1884, and suspended payment on the 15th November, 1887—its paid up capital of $500,000 having been lost or wasted. Few banks, for the short period this Central Bank was in operation, can show so many disastrous, and, in some cases, scandalous financial transactions as those disclosed in the evidence before me.

I must denounce, in the strongest language allowable to judicial utterances, the wrongful practice adopted by this bank of making untrue returns of its shareholders to the Government. The evidence discloses that, although between 6,000 and 7,000 shares were subscribed for between the opening of the stock books and the suspension of the bank, each year's return to the Government cut them down to only 5,000. A vicious and unlawful practice of "dropping out" shares from these returns seems to have been invented, without its purpose being explained. Thus, in February, 1884, when it got its license from the Government, 5,010 shares were returned; between that date and the next return in January, 1885, 1,008 additional shares were subscribed for, making the total number 6,018 shares, but only 5,000 were returned. Between the 31st December, 1885, and 31st May, 1886, new holders to the extent of eighty-five shares came in, and an equal number of the shares previously returned to the Government were "dropped out." Between this latter date and the 5th November, 1886, new shares to the number of 346 were subscribed for, but, to keep the figures at 5,000, 360 shares previously returned and published in the Government blue books were "dropped out," and of these fourteen were redistributed. On many of the shares so "dropped out" the ten per cent. required by the Bank Act had been paid. This practice has apparently delayed the creditors of the bank in enforcing the liability of the shareholders so "dropped out"; but I have directed the liquidators to investigate the stock boo s and othe contracts respecting shares, and to bring in a supplementary list of contributories. This, if not in the interest of the creditors, is in the interest of those shareholders who have lost their paid-up shares and are now called upon to pay their double liability, for after the creditors are paid off these shareholders have the right to call upon the non-paying shareholders, who are still liable, to adjust with them the accounts and equities of their common liability as partners and shareholders in this bank. Equally wrongful were the proceedings by which about $41,000 of the capital of the bank deposited in the Bank of Montreal, and which were included in its certificate to the Government, were "dropped out" of the accounts of the capital stock as entered in the books of this bank. The money deposited in the Bank of Montreal became and was the money and lawful property of the Central Bank, and no manipulation of the books or accounts, or alleged misappropriation by the directors, could lawfully deprive the Central Bank and its creditors of the money so received for the purpose of its organization.

In disposing of the various defences affecting the liability of the shareholders as contributories under these liquidation proceedings, I have allowed a latitude of defence and an admission of evidence which would not be allowable in ordinary cases. This exceptional course was adopted, not from any reasonable doubt as to my jurisdiction to hear the limited issues of fact, properly triable, but because this was the first case in which the double liability of shareholders was to be enforced, and because I felt I would be better able at the close of the evidence to define the limits of the inquiry and the extent of the jurisdiction I exercise in disposing of the various questions raised by the contributories. Another reason was my belief that the disclosures affecting the inception and financial management of this short-lived bank would be in the public interest, and therefore beneficial and cautionary to the banking and commercial interests of the community, as well as to the directors and other responsible officers of financial corporations.

As to the defence that the bank was never legally organized, or if organized, that its

charter, and therefore its corporate character, had been forfeited, there are several answers. The Act incorporating the bank (46 Vic., c. 50 D.) constitutes the parties named in the Act and such other persons as may become shareholders, and their assigns, a corporation by the name of "The Central Bank of Canada." The Act requires that before commencing business this corporation shall obtain from the Treasury Board a certificate that $500,000 of capital had been *bona fide* subscribed, and that $100,000 had been *bona fide* paid up. It also provides that if $200,000 be not paid up before obtaining such certificate, such sum shall be called in and paid up "within one year from the date of such certificate." Then follows a proviso that a failure to comply with these conditions shall render the Act null and void, and the charter shall be forfeited. Following this proviso comes the last section of the Act, which reads thus: "This Act shall remain in force until the 1st July, 1891." There seems, therefore, to be an apparent contradiction between the proviso and the last clause as to the life of the Act, and therefore as to the legal vitality of the corporation created by it. Under the ordinary canon of statutory construction the last clause must be read as qualifying and controlling the proviso to the extent, I think, of providing that while the corporation is to continue until July, 1891, its power of transacting the business of banking is to be contingent upon its complying with the conditions prescribed by the Act of Incorporation: *Re Holt*, 4 Q.B.D. 29; *Castrique* v. *Page*, 13 C.B. 461. This want of harmony appears to run through all the Acts incorporating banks.

Another defence is that the validity of the certificate of the Treasury Board, under which the Bank is authorized to commence business, is impeachable. Though the English law as to the effect of the certificate of the public officer under which a corporation there may commence business, is not in all respects similar to the Dominion law, it would appear that the purport of the certificate is the same. The Courts there have held that such certificate is not only *prima facie*, but conclusive, evidence that all previous requisites have been complied with. And they hold that even should the public officer miscount the shares, where there was not the statutory number, and grant the certificate, such certificate could not thereafter be impeached: *Bird's case*, 1 Sim. N.S. 147.

The cases on this point also show that, where by reason of such certificate a corporation is held out to the world as ready to undertake business, most disastrous consequences would follow to commercial undertaking if any person was allowed to go back and enter into an examination of the circumstances attending the original corporation: *Oakes* v. *Turquand*, L.R., 2 H.Lds. 325; *Peel's case*, L.R., 2 Ch. 684. For these reasons it is not competent for an objector to show that by reason of any prior defect, all the acts and contracts of the company since its supposed incorporation, were null and void: *Bird's case*, 1 Sim. N.S. 147.

Under the United States Banking Act the banks in that country are not allowed to commence the business of banking until they obtain a certificate from the comptroller—a provision very similar to that in our Banking Act already referred to. There is no direct decision in our Courts as to the conclusiveness of the certificate of the Treasury Board; but decisions of the Federal and State Courts of the United States show that the validity of the comptroller's certificate there cannot be questioned by any collateral proceeding, and that it is conclusive for all the purposes of the bank's organization: *Casey* v. *Galli*, 94 U.S.R. 673. And the Courts there have also held that one who contracts or deals with a corporation as existing in fact, is estopped from denying as against such corporation its regular organization, or contending that it has not been legally authorized to transact the business of its incorporation: *Chubb* v. *Upton*, 95 U.S.R. 665; *Close* v. *Greenwood Cemetery*, 107 U.S.R. 466. In the case of *Casey* v. *Galli*, 94 U.S.R. 673, cited above, the United States Supreme Court said: "Where a shareholder or a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must

take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent in its effects and consequences should be as if it were real; and the law properly so regards it."

In this country a similar rule applies to the letters patent incorporating a company—such letters patent being held to be conclusive evidence that all the preliminary statutory requisites to incorporation had been complied with: *Lake Superior Company* v. *Morrisen*, 22 C.P. 224.

A great deal of evidence has also been given with the object of establishing some infirmities of title to the shares held by the transferrors of those who are now before me as contributories. These infirmities of title could, and ought to have been, investigated by these parties at the time they acquired their shares, or within a reasonable time thereafter. In a large majority of cases they accepted the shares as valid and good; they paid money for them, which went into the capital of the bank, and they received from the bank and accepted share certificates and dividends in cash as the percentage of profit which their shares had realized by the financial operations of the bank. Some of them attended the meetings of shareholders; some granted proxies to directors, some transferred within the month prior to the suspension a portion or all of the shares so held by them in the bank.

After so committing themselves as shareholders, they now contend that their shares never had a lawful existence, that by non-payment of ten per cent. within thirty days after the original subscription, the shares were not lawfully subscribed; that shares subscribed for by the directors to make up the statutory amount were held under an unlawful trust for the bank, and therefore void; that the bank bought and trafficked in its own shares, and that the cashier, Allen, or other transferrors, had not shares to meet the amount or number stated in the transfer to them in the transfer book of the bank.

I had held in *Day's case* that, although the statutory provision requiring payment of ten per cent. within thirty days after subscription, was part of the contract to the shares, it was competent for the parties to waive it; and that where the money had been paid to and accepted by the bank, and stock certificates had issued recognizing the party as a shareholder and dividends on the shares had been paid to him, both parties were estopped from denying that he was a shareholder in the bank. That judgment has been appealed, but as yet stands unreversed.* I must, therefore, follow it in the other cases before me.

Another contention is that under a resolution of the Provisional Board, dated the 10th January, 1884, certain shares were acquired by the directors in trust for the bank, and that the bank has either been trafficking in its own shares contrary to the express provisions of the Bank Act, or that such shares were never subscribed for *bona fide*. The resolution is as follows: "That it being desirable to commence the organization of the bank without further delay, the directors agree to take up (in addition to their present holdings) the balance of the stock unsubscribed up to $500,000 in trust, to hold the same for such persons as may desire to subscribe for stock; and such subscriptions by directors in trust shall be cancelled or transferred *pro rata*, so as to reduce or cancel each holding in proportion, it being understood that no calls are to be payable on such trust holdings until such time as the stock is transferred to or taken by other parties."

The design of the directors was to take stock so as to bring the shares up to $500,000 to enable the bank to go into operation. Several of the directors did so subscribe and did pay certain moneys into the Bank of Montreal as payments on account of the $100,000 required by the Bank Act.

The "understanding" set out in the resolution as to "trust stock" its "cancellation," unless as prescribed in the Bank Act, and that "no calls are to be payable" may be eliminated out of the resolution as void. The moment each director signed the stock subscription book agreeing to take a certain number of shares, he undertook a personal liability to pay all calls upon such shares, from which he could only free himself under the conditions prescribed by the Bank Act.

* Affirmed 5th October, 1888.

Similar proceedings by directors have been attempted in other companies, the latest analogy being furnished in *Union Fire Insurance Company* v. *Shoolbred*, 4 Ont. R. 359. An earlier one is reported in *Port Whitby Ry. Co.* v. *Jones*, 31 U.C.R. 170, where it was held that although directors agreed with a party to take shares to an amount required to organize the company on condition that he should not be liable for calls thereon, such an agreement was in fraud of the Act and could not be availed of; and it was further held that as the party had attended meetings of the company, he could not dispute his being a shareholder, or that he was not liable in respect of the shares subscribed for. In 1840, several directors of a company in England, in order to make up the required number of shares for incorporation, subscribed for stock, and agreed among themselves to vest it in the secretary "in trust for the company;" and they resolved—as in this case—that no calls should be made on such shares. The transfer to the secretary was never executed. Two actions were instituted, one by a shareholder to compel the directors to make calls on themselves and pay up; the other by the directors, to be relieved of their liability, on the ground that they were only trustees for the company, and that the subscription was not *bona fide*. The Court held that the directors, as shareholders, were liable in respect of the deposit and all calls on such shares, and that they could not set up the trust, or claim that the subscription was fictitious and fraudulent for the purpose only of floating the company.

In giving judgment in the first case the Vice-Chancellor said: "The parties became subscribers for these shares; and admitting they did take the shares in trust for the company, they were the holders of these shares and were liable to all those operations that were to be performed by those who held shares. Even to this day there has been no transfer of these shares by the nine subscribers, the consequence of which is, let them state what they please with respect to an acknowledgment of the trust, and an intention to exonerate themselves from any liability as trustees under the provisions of the Act, they are clearly liable when calls are made upon the shareholders:" *Preston* v. *Grand Collier Dock Co.*, 2 R. & C. Cas. 358. And in the action by the directors to be relieved of the shares, he said: "There is an inference raised from the facts that the original subscription of these persons was bad, and that the original project cannot go on. Whereas it does appear to me that these persons who subscribed are now by law liable to pay the whole amount of their subscriptions, and that they are compelled by law to pay. And it would be no answer to an action to compel payment, to say they intended a fraud to be committed. It would rather make the matter worse:" *Mangles* v. *Grand Collier Dock Co.*, 2 R. & C. Cas. 366. Later cases negative the lawfulness of persons acquiring shares "in trust" for the company, and I must therefore hold that the shares so acquired by the directors were legal shares, and carried the liability to pay the calls thereon when lawfully made by the bank.

Another ground of defence is that the bank through Allen, its cashier, trafficked in shares; that he bought in from time to time with the bank's money certain shares which were held by him under the title of "A. A. Allen, cashier in trust," and that the account under that name in the deposit ledger was a bank account in respect of these shares.

To give effect to such a defence would be to fly in the face of the express prohibition contained in the 45th section of the Bank Act, which provides that "the bank shall not, either directly or indirectly, purchase or deal in any shares of the capital stock of the bank," a prohibition which has been held by our own Supreme Court to be "a law of public policy in the public interest, and any violation of it necessarily null and void": *Bank of Toronto* v, *Perkins*, 8 S.C.R. 640.

Such a buying in of shares by the bank would be practically a reduction of its capital stock without the authority of law, and therefore void. In *Trevor* v. *Whitworth*, 12 App. Cas. 409, the question was considered in the double aspect of a reduction of the capital and the buying in of the shares by the company for the purpose of selling again. Lord Herschell in giving judgment said that the stringent precautions to prevent the reduction of capital of a limited company would be idle if the company might purchase its own shares wholesale;

and that if it were otherwise the result would be that the shareholders would receive back the money subscribed, and there would thus pass into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery or stock available to meet the demands of the creditors. And he also held that the purchase of shares for the purpose of re-selling would be a trafficking or dealing in shares, and unlawful.

Whatever may have been Allen's design in the purchasing and selling of shares; the directors examined before me expressly repudiate giving him any authority to do so, except to sell their so-called "trust shares;" and therefore, in view of the penal and prohibitory clauses of the Bank Act on this point, I must hold that the purchase and sale of shares by Allen was on his own account, and that whatever shares he acquired he did so on his personal responsibility.

The defence most strongly urged was that, in any event, Allen in making several of the transfers of shares had not at the date of the transfer the number of shares specified in such transfer. This I find to be a fact on the occasion of some of the transfers. But I must also find as a fact that at the same time he was authorized as agent of the directors who subscribed for the trust shares to sell for them such trust shares, and although at the time the legal title to these shares had not vested in him, he acquired it by transfer shortly afterwards. The law respecting the conveyance of a title to real estate says that if at the time of conveyance the grantor has no title or only an interest, and afterwards acquires the estate in fee, the conveyance which before operated only by estoppel, shall then take effect out of the newly-acquired estate of such grantor: Co. Lit. 47 b. Whether such a rule is applicable to the transfer of shares in a company, may not be necessary to consider in view of the cases to which I shall refer.

But before referring to them I may say that I see nothing in the law to prevent a bank or corporation on receiving from a shareholder a transfer of more shares than he is the registered owner of, recognizing such transfer to the extent of the number of shares the transferror is lawfully entitled to, and then supplementing out of its own authorized but unissued shares a sufficient number to make up the amount required by the transferee. In the cases before me each transferee appeared to have signed in the proper book an acceptance of a specified number of shares, and it was optional in the bank, when there was a deficiency of shares in the transferror, to recognize the ransfer. Where it did, and thereupon issued a share certificate for the specified number of shares,—such certificate would operate, I think, either by way of estoppel, or as an issue of so much of its own shares as would be necessary to complete the specified number required by the incoming shareholder.

But as the question has been settled by authority, it may not be necessary to consider it further.

In *Weikersheim's case*, L.R., 8 Ch., 831, one Lewis, a shareholder, transferred on the 23rd August, 1864, 1,400 shares in the Land Credit Co. to the appellants, but at that date he had no shares registered in his name. On the 5th September the transfers to Lewis were left at the office and registered as of the 30th August. It was contended that as Lewis had not the shares at the date of his transfer, the appellants were not liable, but Lord Justice JAMES held that as the appellants had been registered by the company as shareholders in respect of the 1,400 shares, the want of title in Lewis was not material; and that after such registration the company could not have disputed the right of the appellants as shareholders and members, nor could the appellants have disputed the fact that they were entered on the books of the company as shareholders having all the rights and liabilities of members in the company. Lord Justice MELLISH thought that the registration of the appellants as members of the company would make them "shareholders by way of estoppel;" that they did not really become shareholders until the date of the registration to Lewis (30th August), but that as they had re-transferred the shares to Lewis, it was totally immaterial whether they became shareholders at any one of the prior dates mentioned, because the extent of their liability depended upon the time when they made the re-transfer, and not on the time when they took the transfer of the 1,400 shares.

Other cases show that where the consent to become a member of the company is shown, the invalidity of the transfer may be of no importance, the question to be considered

being, have the transferees agreed to accept the shares purporting to be transferred?

The same doctrine as to one becoming a "shareholder by way of estoppel" has been affirmed by the Supreme Court of the United States.

In a case in which share certificates had issued in blank, the learned judge of the Supreme Court said: "The only question was whether the appellant owned the stock. No one else claimed it. The certificates were issued and delivered to her. They were the muniment of her title. She had paid to the company all that was then payable, and subsequently received a dividend. Her name was placed on the stock list. These facts were conclusive against her. She was estopped from denying her ownership. She could not assert her title if there was a profit, and deny it if there was a loss. The certificates showed the par of the stock and the amount paid. Upon receiving them the law implied an agreement on her part to respond to the balance whenever called upon in any lawful way to do so. It would be a mockery of justice to permit such an objection to prevail:" *Sanger* v. *Upton*, 91 U.S.R. 63.

It is well known that the doctrine of estoppel is generally favored by the Courts, especially where it is essential to the quick and easy transaction of business. And so that a man should be able to put faith in the conduct and representations of his fellow, the Courts have inclined to hold such conduct and representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable: 2 Smith, L.C. 460a.

Acting upon this doctrine, I must hold that where the bank has issued a share certificate, or otherwise recognized the incoming shareholder as entitled to a specified number of shares, where it has entered his name as a shareholder in the proper books of the bank, and where it has paid him as dividends the profits accruing on his shares, and where he has accepted such certificate and dividends, and otherwise acted as a shareholder, both the bank and the shareholder are estopped in law and must be held to the consequences of their acts.

After such a course of dealing rescission of the contract, or renunciation of the relative rights and liabilities of the shareholder and the bank, are impossible; and whatever invalidities there may have been in the original subscription or transfer, or defects in the title of the transferror—they are waived on both sides—the incoming shareholder becomes "a shareholder by way of estoppel."

During the argument I asked what was there to prevent a person desirous of purchasing shares from waiving the formality of signing the stock book, and on paying the full value of a specified number of shares, and having his name entered as a shareholder in the proper books, and obtaining a share certificate—the muniment of his title—from the company, and so becoming a shareholder? The reply given was that the law required a written subscription.

My question has, I find, been answered by our Court of Appeal in *Caston's case*, 12 App. R. 486. That case was under a statute which contained similar provisions as to subscription and payment to those prescribed by the Bank Act. The facts there showed that the appellant had signed powers of attorney, authorizing the manager of the company to subscribe for shares for him. The manager did not subscribe the stock book, but caused an account to be opened in the company's books as if he was a shareholder, and credited him with certain fees due him for services as a solicitor. In giving judgment, HAGARTY, C.J., said: "There are cases in which a person's status and liability as a shareholder can be established without an actual subscription or written agreement to take stock." BURTON, J.A.: "The applicant having been allotted and having accepted shares, is a shareholder." OSLER, J.A.: "I agree that it was not necessary that he should actually sign a subscription list. . . . In these circumstances it appears to me that each party is estopped as against the other from denying that Mr. Caston became a shareholder."

And the last named judge (OSLER, J.), in *Union Fire Ins. Co.* v. *O'Gara*, 4 Ont. R. 369, said: "A person may make himself liable as a shareholder in many other ways than by subscribing for shares and obtaining a formal allotment; and one who had caused his name to be entered on the company's books as a shareholder in respect of shares taken for the purpose of making up the statutory amount would, on principle, clearly be estopped from

afterwards saying he was not the holder of such shares."

It may be added that, although many defences are open to shareholders in actions between themselves and the bank, the rule is clearly established that such defences must be availed of within a reasonable time, and before any waiver of the defence by accepting dividends, or otherwise dealing with the shares.

But the right to such defences—even to that highest defence, fraud—is gone the moment the bank comes under the operation of the Winding-up Act, and its members are transformed from "shareholders" or owners of its share property to "contributories," or persons bound to contribute to the assets, for the benefit of the creditors. After an order to wind up a company there are only creditors and contributories and no company, and then rescission of the contract in respect of the shares is impossible: *Burgess' case*, 15 Ch. D. 509. The question then to be considered is not who is the person who is the owner of the shares, but who is liable in respect of the legal tenancy, at the time the tree was cut down: per Lord Westbury in *Barrett's case*, 4 De G.J. & S. 421.

I have now, I think, disposed of the various defences raised in the majority of the cases before me. A few others must be dealt with separately on the settlement of the list.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

ROBERTSON *v.* WIGLE (THE ST. MAGNUS).

[March 19.

Maritime Court—Collision—Damages—Party in fault—Answering signals.

The owners of the tug "B. H." sued the owners of the steam propellor "St. M." for damages occasioned by the tug being run down by the propellor in the River Detroit.

Held, reversing the judgment of the Maritime Court of Ontario, that as the evidence showed the master of the tug to have misunderstood the signals of the propellor, and to have directed his vessel on a wrong course when the two were in proximity, the owners of the propellor were not liable, and the petition in the Maritime Court should be dismissed.

Appeal allowed with costs.

MacKelcan, Q.C., and *Lash*, Q.C., for the appellants.

Christopher Robinson, Q.C., and *S. White*, for the respondents.

WARNER *v.* MURRAY.

[April.

Insolvent estate—Claim by wife of insolvent—Money given to husband—Loan or gift—Questions of fact—Finding of Court below.

M., having assigned his property to trustees for the benefit of his creditors, his wife preferred a claim against the estate for money lent to M. and used in his business. The assignee refused to acknowledge the claim, contending that it was not a loan, but a gift to M. It was not disputed that the wife had money of her own, and that M. had received it. The trial judge gave judgment against the assignee, holding that M. did not receive the money as a gift. This judgment was confirmed on appeal.

Held, affirming the judgment of the Court of Appeal, that as the whole case was one of fact, namely, whether the money was given to M. as a loan by, or gift from, his wife, who in the present state of the law is in the same position, considered as a creditor of her husband, as a stranger, and as this fact was found on the hearing in favor of the wife and confirmed by the Court of Appeal, this, the second Appellate Court, would not interfere with such finding.

Appeal dismissed with costs.

Moss, Q.C., for the appellant.

Gibbons, for the respondent.

VIRTUE *v.* HAYES, *in re* CLARKE.

[April 9.

Appeal—Final judgment—Jurisdiction—Discretion of Court or judge.

Judgment was recovered in the suit of *Virtue* v. *Hayes*, brought to realize mechanic's liens, and C., the owner of the land

on which the mechanic's work was done, applied by petition in the Chancery Division to have such judgment set aside as acted upon his title. On this petition an order was made allowing C. to come in and defend the action for lien on terms, which not being complied with, the petition was dismissed, and the judgment dismissing it was affirmed by the Divisional Court and the Court of Appeal. On appeal to the Supreme Court of Canada,

Held, that the judgment appealed from was not a final judgment within the meaning of sec. 24 (a) of the S. & E. C. Act, or if it was, it was a matter in the judicial discretion of the Court, from which by sec. 27 no appeal lies to this Court.

Appeal quashed without costs.

S. R. Clarke, appellant in person.

W. Cassels, Q.C., for the respondent.

GRAND TRUNK RAILWAY CO. *v.* MCMILLAN.

[March 18.

Railway company—Carriage of goods—Bill of lading—Carriage over several lines—Negligence—Exemption from liability for—R.S.C., c. 109, s. 104—Construction of—Joint tort feasors—Action against—Bar to—Discharge by one.

M. shipped certain goods by the Grand Trunk Railway from Toronto to Portage La Prairie, and the bill of lading contained the following condition:

"10. All goods addressed to the consignees at points beyond the places at which the company has stations, and respecting which no directions to the contrary shall have been received at those stations, will be forwarded to their destinations by public carriers or otherwise as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them, or they may, at the discretion of the company, be suffered to remain on the company's premises or be placed in shed or warehouse (if there be such convenience for receiving the same) pending communications with the consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery of the goods by the company will be considered complete, and all responsibility of said company shall cease when such other carriers shall have received notice that said company is prepared to deliver to them the said goods for further conveyance, and it is expressly declared and agreed that the said Grand Trunk Railway Company shall not be responsible for any loss, mis-delivery, damage or detention that may happen to goods so sent by them, if such loss, mis-delivery, damage or detention occur after the said goods arrive at said stations or places on their line nearest to the points or places which they are consigned to, or beyond their said limits."

Held, on the authority of *Bristol & Exeter Railway Co.* v. *Collins* (7 H.L.C. 194), that this clause could not operate to restrict the liability of the Grand Trunk Railway to loss or damage occurring on their own line, but that the contract by the Grand Trunk Railway Co. must be held to be for the carriage of the goods over the whole route so far as it could be performed by railway, and the other companies over whose lines the goods were to be carried to be the mere agents of the Grand Trunk Railway Co. for the purpose of such carriage.

Sec. 104 of the Railway Act, R.S.C., c. 109, gives a right of action against a railway company for breach of certain regulations and for failure to convey and deliver goods, etc., and declares that from such action "the company shall not be relieved by any notice, condition or declaration if the damage arises from any negligence or omission of the company or of its servants."

Held, that the plain construction of the whole section is that this prohibition only affects railway companies in respect to their duties and obligations as common carriers, and the Grand Trunk Railway Company could, therefore, limit their liability, either as carriers or otherwise, in respect of goods to be carried after leaving their own line, the contract for such carriage being one they might have declined altogether. *Vogel* v. *The Grand Trunk Railway Company*, 11 Can. S.C.R. 612, distinguished.

The evidence showed that the loss and damage to the goods in this case occurred not in transit, but after their arrival at the station named as the place of delivery and while in possession of another company.

Held, reversing the judgment of the Court below (15 Ont. App. R. 14), FOURNIER and GWYNNE, JJ., dissenting, that the above clause put an end to the liability of the Grand Trunk Railway Company after such arrival, and the company having possession of them held them thenceforth as warehousemen and bailees for the consignees.

Held, also, with the like dissent, that the Grand Trunk Railway Company were relieved from liability by reason of the consignees failing to give notice of their claim for loss within thirty-six hours after the arrival of the goods, as provided in another condition of the bill of lading.

Quære: Under the present law, is a release to, or acceptance of satisfaction from, one of several joint tort feasors, a bar to an action against the others?

Appeal allowed.

McCarthy, Q.C., and *Nesbitt*, for the appellants.

Robinson, Q.C., and *Galt*, for the respondent.

MONETTE *v.* LEFEBVRE, *et al.*

Practice—Right to appeal—(P.Q.)—Amount in controversy—Supreme and Exchequer Courts Acts, s. 29, construction of—Jurisdiction.

In an action of damages for slander contained in certain resolutions adopted by defendants (respondents) as school commissioners of the parish of St. Constant, the plaintiff (appellant), claimed by his declaration $5000 damages, and prayed that the defendants be ordered to enter in the Minute Book of the School Commissioners the judgment in the cause, and that the same be read at the church door of St. Philippe two consecutive Sundays. The case was tried before a judge without a jury, and the plaintiff was awarded $200 damages. The defendants thereupon appealed to the Court of Queen's Bench (appeal side), and the plaintiff did not file any cross appeal, but contended that the judgment for $200 should be affirmed. The Court of Queen's Bench, setting aside the judgment of the Superior Court, held that a retraction made by the defendants, and a tender of $40 for damages and the costs of an action of $40, were sufficient, and dismissed the plaintiff's action for the surplus.

The plaintiff thereupon appealed to the Supreme Court of Canada, and it was

Held, that the case was not appealable, as the matter in controversy did not amount to the sum or value of $2,000.

Where the plaintiff has acquiesced in the judgment of the Court of first instance by not appealing from the same, to the Court of Appeal of the Provine, the measure of value for determining his right of appeal to the Supreme Court of Canada under sec. 29 of the Supreme and Exchequer Courts Act, is the amount awarded by the said judgment of the Court of first instance, and not the amount claimed by his declaration.

Allan v. *Pratt*, 13 App. Cas. 780, followed; *Joyce* v. *Hart*, 1 Can. S.C.R. 321, and *Levi* v. *Reed*, 6 Can. S.C.R. 482, overruled.

Appeal quashed without costs.

Lacosts, Q.C., and *Pagnuelo*, Q.C., for appellant.

Geoffrion, Q.C., and *Robidoux*, for respondents.

LABELLE, *et al*, *v.* BARBEAU.

Appeal—Judicial deposit by insurance company—Rival claims as to same—Value of matter in controversy—Jurisdiction—Supreme and Exchequer Courts Act, s. 29.

The Ætna Life Insurance Company deposited with the Prothonotary of the Superior Court, under the Judicial Deposit Act of Quebec, the sum of $3,000, being the amount of a life policy issued by the company to one E. L., which by its terms had become payable to those entitled to the same, but to one half of which sum rival claims were put in. The appellants, as collateral heirs of the deceased, by a petition claimed the whole of the $3,000, and the respondent (*mise-en-cause* petitioner), the widow of the deceased, by a counter petition claimed as *commune en biens* one half, and, in her answer to the appellants' petition, prayed that in so far as it claimed any greater sum than one half it should be dismissed. After issue joined the Superior Court awarded one half to the appellants, and the other half to the respondent. From this judgment the appellants appealed to the Court of Queen's Bench (appeal side),

and that Court confirmed the judgment of the Superior Court.

Thereupon the appellants appealed to the Supreme Court of Canada, and it was

Held, that as the sum or value of the matter in controversy between the parties in this case was the sum of $1,500, and fell short of the appealable amount, the case was not appealable: R.S.C., c. 135, s. 29.

FOURNIER, J., *dubitante.*

Appeal quashed with costs.

Trenholme, for motion to quash.

Laflamme, Q.C., contra.

SNOWBALL *v.* NEILSON.

[March 18.

S., a judgment creditor of J.N., sr., applied to the Supreme Court of New Brunswick on affidavits, to have a judgment of J. N., jr., against said J. N., sr., his father, set aside as being obtained by collusion and fraud, and in order to cover up assets of the said J.N., sr. The facts alleged in the affidavits supporting the application were: that a cognovit was given and said judgment of J. N., jr., was signed on the same day; that no account was ever rendered of the debt; that no entries were ever made by said J. N., jr., against his father; that the account for which the cognovit was given was made up from calculation and not from books; that the father had offered to have the judgment discharged on payment of a much smaller sum, and that on an examination of the father for disclosure he would not swear that he owed his son the amount, and that he had had no settlement of accounts. The affidavits in answer stated how the debt had accrued, giving the details; that there was no collusion between the father and son; that the son had frequently asked his father for a settlement, but could not get it, and that he had never been a party to or authorized any settlement. The Court below held that the applicant had failed to show fraud, and refused to set aside the judgment.

Held, that the decision of the Court below should be affirmed.

Appeal dismissed.

G. J. Gregory, for appellant.

Hanington, Q.C., and *J. A. Vanwart*, for respondent.

MACFARLANE *v.* THE QUEEN.

[March 18.

Criminal law—Assault—On constable in discharge of duty—Indictment for—Service of summons under C. T. Act—Wife of defendant—Competent as witness on trial.

A constable in attempting to serve a summons on M. for violation of the Canada Temperance Act, was assaulted by M. and his wife. On indictment for such assault as an assault on a constable in discharge of his duty, under 32-33 V., c. 20, s. 39; R.S.C., c. 162, s. 34,

Held, affirming the judgment of the Court below, that such section applies to the case of a constable serving a summons for violation of the Canada Temperance Act.

Held, also, that on the trial of such an indictment neither the defendant nor his wife is a competent witness under sec. 216 of the Act relating to procedure in criminal cases, R.S.C., c. 174.

Appeal dismissed.

J. A. Vanwart, for the appellant.

R. J. Ritchie, Sol.-Gen. of New Brunswick, for the respondent.

MARITIME BANK *v.* TROOP.

[March 19.

Winding-up Act—R.S.C., c. 129, s. 57—Double liability—Set off.

Sec. 57 of the Winding-up Act, R.S.C., c. 129, provides that "the law of set-off as administered by the Courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due, or accruing due, to the company at the commencement of the winding up, in the same manner and to the same extent, as if the business of the company was not being wound up under this Act."

Held, reversing the judgment of the Supreme Court of New Brunswick, that this section does not give a right to a contributory to set off an independent debt owed to him by a company against calls made in the course of winding up proceedings either for capital or double liability.

Appeal allowed with costs.

Barker, Q.C., for the appellants.

J. A. Vanwart, for the respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

Queen's Bench Division.

Divisional Court.] [March 7.

TRUAX *v.* DIXON.

Mechanics' Liens—Material men—Extent of lien—Cross claim by owner against contractor—Set-off—Payment—Registered claim of lien, requirements of—R.S.O. c. 126, ss. 9, 10 16, and schedule—Affidavit—Commissioner.

The last of the materials in respect of which the plaintiffs as sub-contractors claimed a lien under the Mechanics' Lien Act, upon the estate of the land-owner, were delivered on the 16th September, 1887, and the claim of lien was not registered, nor was notice in writing given until the 11th October, 1887, and this action to enforce the lien was not brought till the 29th October, 1887.

Held, that under ss. 9 and 10 of R.S.O. c. 126, the lien claimed did not attach so as to make the owner liable to a greater sum than the sum payable by the owner to the contractor.

Goddard v. *Coulson*, 10 A.R.I., followed.

The owner had an old account against the contractor for bread supplied, which account with interest he charged against the sums due to the contractor under the contract.

Held, upon the evidence, that the account and interest should be treated not as a matter of set-off, but as a payment of so much of the contract price.

S. 16 of R.S.O. c. 126, requires that the claim of lien shall state the time or period within which the materials were furnished. The claim registered in this case did not state the year, but only the months and days of the months, in which the materials were furnished. It stated, however, that the materials were furnished on or before the 17th September, 1887, and in this and all respects it followed form I. in the schedule to the Act; and ss. 2 of s. 16 provides that the claim may be in one of the forms given in the schedule to the Act.

Held, that the statement that the materials were furnished on or before a named day was a sufficient statement of the time or period within which they were furnished, according to the true intent and meaning of s. 16.

Roberts v. *McDonald*, 15 O.R. 80, overruled.

The question of the authority of schedules to Acts of Parliament discussed.

The land upon which the lien was claimed was in the County of Wellington, but the affidavit of the plaintiffs verifying the claim of lien registered, was made in the County of Bruce, and before a commissioner for taking affidavits in that county.

Held, that the affidavit satisfied s. 16, ss. 2 of the Act.

H. P. O'Connor, for the plaintiffs.

W. H. Kingston, for defendant, George Dickson.

Chancery Division.

BOYD, C.] [Jan. 16.

RE MCMILLAN.

Agreement—Power of those for whose benefit it is made to enforce same—Release.

In consideration of a conveyance to him of a certain farm, H.M. agreed with his mother, M.J.M., that he would during her life provide her with a house on the farm, and with necessaries, and support his brothers and sisters thereon, until they reached sixteen years of age, so long as they remained at home on the said farm and assisted him so far as they were able in the management of it.

Held, that M.J.M. had no right or power to release H.M. from the obligations undertaken by him with reference to his brothers and sisters under the above agreement, and if the children did their part they could hold their brother to his promises, though the agreement was not in terms made with them as parties.

Hoyles, for petitioner.

ROBERTSON, J. [Feb. 14.

Re SPROULE, SHARP *v.* SPROULE.

Will—Construction—Devise "if my father does not alter his will—Legacies—Vesting.

A testator by his will provided that in case his father did not revoke his will and so deprive him (the testator) of certain lands therein devised to him, then he (the testator) devised to S. certain

lands, but in the event of his father altering his will and depriving him (the testator) of the lands therein devised to him, then he devised the said land otherwise.

He then bequeathed pecuniary legacies to certain of his children, adding in the case of those of them who were under eighteen, the words, "to be paid to them when they come of age," and concluding, "I do hereby authorise and direct my said executors to invest the moneys devised to my children in good legal securities, until they arrive of age, and the interest obtained from such investment to be paid to my wife to assist her in supporting and educating my family."

The father of the testator did not revoke or alter his will in the way referred to, but the testator pre-deceased him.

Held, that the words relating to the alteration of his will by the father of the testator must be construed as meaning that if the testator became the owner of the lands devised in his father's will, so that he could have a disposing power over them, then that they should go in the manner mentioned.

Held, also, that the pecuniary legacies were all of them vested; and that the legacy left to each child which did not attain twenty-one within the year after the testator's death, was to be invested until each child came of age, and the interest up to the several times when they should each attain twenty-one, should be applied in assisting the widow or mother to maintain and educate such child or children, and as each child attained twenty-one he or she would be entitled to be paid their respective legacies.

F. A. Anglin, for the executors.

J. Hoskin, Q.C., for the infant children of the testator.

N. F. Paterson, Q.C., for the adult defendants.

BOYD, C.] [February 28.

ANGLO-CANADIAN MUSIC PUBLISHERS' ASSOCIATION *v.* SUCKLING.

Copyright—British—Canadian—R.S.C. c. 62.

There is a very clear distinction to be observed in the Copyright Act, R.S.C. c. 62, between works which are of prior British copyright and those which are of prior Canadian copyright. If there is a prior British copyright and thereafter Canadian copyright is obtained by the production of the work, then by s. 6 that local copyright is subject to be invaded by the importation of lawful British reprints.

But if the Canadian copyright is first on the part of the author or his assigns, then under s. 4, the monopoly is secured from all outside importation.

The Imperial Parliament has sanctioned and reiterated colonial legislation whereby the possessor of a prior Canadian copyright is secured completely against all interference to the territorial extent of the Dominion, even as against English reproductions or copies made under a subsequent British copyright.

Bain, Q.C., for the plaintiff.

W. Cassels, Q.C., for the defendant.

STREET, J.] [March 18.

CAMERON *v.* GIBSON.

Mortgage — Conveyance — Merger — Chattel mortgage of growing crops.

A.C., owner of certain lands, mortgaged them to the Canada Permanent Loan and Savings Co., and afterwards executed two successive mortgages to one H. Afterwards, in 1887, A. C. sowed eight acres of fall wheat, and in January, 1888, made a chattel mortgage of this fall wheat to G., which chattel mortgage was properly registered. On April 4th, 1888, before the harvest, under pressure from H., A.C. conveyed to H. the lands for a consideration equal to what was due on the three mortgages and a small additional unsecured debt due from him to H. On April the 5th, 1888, H. leased the property to A.J.C. for a year.

When the fall wheat was ripe, A.J.C. cut and harvested it, but G. sent and seized it under his chattel mortgage, and A.J.C. now brought this action to recover the value of the wheat.

Held, that on his taking the conveyance from A.C., the rights of H., as mortgagee, were merged, for the evidence pointed strongly against an intention on his part that the mortgage debts should remain, and therefore G's. right as chattel mortgagee] became prior in

point of time to the title of A.J.C., and the action must be dismissed. As mortgagee, H. would no doubt have had the right to take possession of the crops as part of his security.

Klein, for the plaintiff.

O'Connor and *O'Connor*, for the defendant.

Full Court] [March 18.

HORTON *v.* PROVINCIAL PROVIDENT INSTITUTION.

Insurance—Certificate of membership—Default—Forfeiture—Waiver.

Judgment of ROBERTSON, J., 16 O.R. 382, affirmed with costs.

Mowat, Q.C., and *Robertson*, for the defendants.

Meredith, Q.C., for the plaintiff.

BOYD, C.] [March 26

HOBBS HARDWARE CO *v.* KITCHEN.

Chattel mortgage—Advance of firm moneys—Mortgage taken to one partner.

A. and B. were partners as money lending brokers, and were in the habit of lending firm moneys and taking securities therefor in the name of the individual partners, as each was willing to accept the security of the person seeking to borrow. An advance of firm moneys was made to C. on a chattel mortgage made to B., who made the affidavit of *bona fides*, and A. was the subscribing witness thereto. In an interpleader issue between creditors of C., who claimed under executions, and B., who claimed under the mortgage, in which, while it was admitted there was no fraud or *mala fides* in the transaction, it was contended that both members of the firm should be specified as mortgagees. It was

Held, that there was nothing illegal or misleading to the public in such an arrangement, and that creditors should not be allowed to take advantage of it to the detriment of an honest lender, that as partners are joint owners in law of the assets of the firm, there is no *legal* objection to a loan by one member from the moneys of the firm and the taking of the mortgage to himself; while in equity the security is the property of the partnership, and the individual mortgagee would have to account for the moneys advanced, and judgment was given for the claimant for the mortgage.

Gibbons, Q.C., for the execution creditors.

Hoyles, for the mortgagee.

BOYD, C.] [April 1.

RE STURGIS.

Will—Attesting witness—Beneficiary.

Appeal from rulings of Master at Brantford.

After a person named as a beneficiary in a will had signed her name as an attesting witness, it was discovered that she was the same person as was named as the beneficiary. Two other witnesses then signed the will with the consent of the testator, but the name of the first attesting witness was not erased.

Held, that nevertheless evidence was admissible to show the above circumstances, and the right of the beneficiary to take under the will was not defeated.

W. H. Blake, for defendants (appellants).

E. T. English, for plaintiffs.

BOYD, C.] [April 1, 1889.

DOMINION BANK *v.* OLIVER.

Bank Act—Mortgage—Renewal notes—Warehouse receipt—Negotiation.

If a bank holding a mortgage as additional security for the payment of certain notes substitutes for these notes renewals from time to time, without, however, receiving actual payment, the whole series of notes and renewals form links in one and the same chain of liability, which is secured by the mortgage, although as a matter of bookkeeping, the bank may have treated the first notes and the subsequent substitutionary notes as paid by the application of the proceeds from time to time of the renewals.

The simple renewal of notes by a bank is not a "negotiation" within the meaning of s. 53, subs. 4, of the Bank Act, so as to validate a warehouse receipt taken as collateral security, no new advance being made, and no valuable consideration being given or surren-

dered contemporaneously by the bank, which might represent the inception of a new transaction or negotiation of securities.

Moss, Q. C., for defendants Oliver and Knowlton.

W. N. Miller, Q.C., for plaintiffs.

BOYD, C.] [April 1.

RE ZOOLOGICAL CO.

Companies—Subscript on—Allotment.

Appeal from ruling of Master in Ordinary.

When one C. signed the subscription book of a company incorporated under R.S.O. 1887, c. 157, under the following agreement: "We the undersigned do acknowledge ourselves to be subscribers to the capital stock of the company for the number of shares and to the amount set opposite our names, and we do hereby covenant, promise and agree, each with the other of us, * * * to pay the amount of our said subscription and all calls thereon, when and as the same may be called up under the provisions of the Joint Stock Act or under any by-laws which may be passed,"

Held, following *re Queen City Company*, 10 O.R. 264, that this amounted to a complete and absolute engagement with the company, and with the other signatories which bound C., and the engagement was not conditional on the allotment of stock.

If the stock was not given to the signatories each could enforce the engagement specifically and needed to do nothing more to perfect the agreement.

A. C. Galt, for E. S. Cox.

W. Creelman, for liquidator.

Practice.

ROSE, J.] [April 2.

MARITIME BANK *v.* STEWART.

Bankruptcy and insolvency—English Bankruptcy Act, 1883—Proving claim under—Staying action in Ontario.

This action was begun in March, 1887, to recover $220,000 from the defendants. The defendants having become subject to proceedings in bankruptcy, the plaintiffs presented their claim and lodged it with the assignee in bankruptcy in England, in September, 1887. The judge in bankruptcy in England made an order enjoining the plaintiffs from proceeding with this action in the High Court of Justice for Ontario; and subsequently an order was made in this action by the Master in Chambers staying the proceedings forever.

Quære, whether there was power under the English Bankruptcy Act, 1883, to grant the injunction referred to? But,

Held, that there was power in this Court to make the order, either under s. 10 of the English Act, or by reason of the equity of the case and the power of the Court to administer that equity, and the order of the Master in Chambers staying proceedings was affirmed.

Howell v. *Dominion of Canada Oil Refin ng Co.*, 37 U.C.R. 484; *Regina* v. *College of Physicians and Surgeons of Ontario*, 44 U.C.R 564; *Ellis* v. *McHenry*, L.R. 6 C.P. 250, specially referred to.

Gormully, for plaintiffs.

McCarthy, Q.C., for defendants.

MR. DALTON, Q.C.] [April 8.

WALLBRIDGE *v.* TRUST & LOAN CO.

Security for costs—Plaintiff, although suing for another, interested in result.

Where a plaintiff in an action is not an actor therein, but is a mere passive instrument in the hands of the real plaintiff by whom the action is brought, security for costs will be ordered; but where the plaintiff, although he partly brings the action for the benefit of another, who has agreed to contribute to the expense thereof, is also himself largely interested in the result, he is to be considered as the real acting plaintiff and cannot be compelled to give security for costs.

Delaney v. *MacLellan*, *ante* p. 191, distinguished.

Aylesworth, for plaintiff.

A. H. Marsh, for defendants.

BOYD, C.] [April 15.

In re DOLSEN.

Railways—Taking land for—Costs—Railway Act of Canada, 51 Vict., c. 29, ss. 136, 137—Infants interested in land—Sale and conveyance—Necessity for order.

Where land was conveyed to C.D. for life with remainder to her children, and C.D. during the infancy of her children agreed to sell and convey the land to a railway company for the purposes of its railway:

Held, that C.D., notwithstanding the provisions of s. 136 of the Railway Act of Canada, 51 V,. c. 29, had no right in law to sell; to get such a right an order of a judge, under s. 137, was required; and where the proceeding was entirely for the benefit of the railway company, and no factious opposition was raised by anyone, the company should pay the costs of the order as part of the price of the land.

J. Hoskin, Q.C., for infants.

Hoyles, for Ont. & Q.R.W. Co.

Appointments to Office.

DEPUTY ATTORNEY-GENERAL OF ONTARIO.

J. R. Cartwright, of Toronto, to be Deputy Attorney-General for Ontario, *vice* E. F. B. Johnston.

INSPECTOR OF REGISTRY OFFICES.

E. F. B. Johnston, of Toronto, to be Inspector of Registry Offices for the Province of Ontario, *vice* Hon. Sidney Smith, resigned.

OFFICIAL REFEREE.

Neil MacLean, of Toronto, to be an Official Referee under s.s. 2 of s. 124 of the Act Respecting the Supreme Court of Judicature.

REGISTRAR OF DEEDS.

Haldimand.

William Parker, of Jarvis, to be Registrar of Deeds for the County of Haldimand, *vice* A. G. Farrell, deceased.

LOCAL REGISTRAR, H. C. J., ETC.

Halton.

Walter A. Lawrence, of Hamilton, to be Local Registrar of the High Court, Registrar of the Surrogate Court and Clerk of the County Court of the County of Halton, *vice* Wm. L. Pearson, to take effect on 1st June next.

DEPUTY-REGISTRAR H. C. J., CHY. DIV.

Huron.

S. Malcolmson, of Goderich, to be Deputy-Registrar at Goderich of the Chancery Division of the High Court of Justice, *vice* H. McDermott, deceased.

POLICE MAGISTRATES.

Amherstburg.

Samuel McGee, of Amherstburg, to be Police Magistrate for the Town of Amherstburg, without salary.

Morrisburg.

Andrew A. Logan, of Morrisburg, to be Police Magistrate for the Village of Morrisburg, without salary.

DIVISION COURT CLERKS.

Haliburton.

S. Kettle, of Glamorgan, to be Clerk of the Third Division Court of the Provisional County of Haliburton.

Wellington.

Hugh Black, of Eramosa, to be Clerk of the Third Division Court of the County of Wellington.

Oxford.

James Munro, of Embro, to be Clerk of the Third Division Court of the County of Oxford.

BAILIFFS.

Frontenac.

George Greenwood, of Wolfe Island, to be Bailiff of the First Division Court of the County of Frontenac, *vice* W. J. McGrath, resigned.

Haliburton.

John Dovell, of Glamorgan, to be Bailiff of the Third Division Court of the Provisional County of Haliburton.

Welland.

Irvin Teal, of Bertie, to be Bailiff of the Third Division of the County of Welland, *vice* Geo. Graham, resigned.

Huron.

Philip Sipple, of Zurich, to be Bailiff of the

Tenth Division Court of the County of Huron, *vice* E. Bosenberry, resigned.

Peel.

John Clendening, of Streetsville, to be Bailiff of the Second Division Court of the County of Peel, *vice* Robert Irwin, resigned.

Prescott and Russell.

Francis Menard, of Clarence Creek, to be Bailiff of the Tenth Division Court of the United Counties of Prescott and Russell.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with Clause four of this curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk as the case may be), on conforming with clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher and pay $1 fee; and on or before the day of presentation or examination file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday in June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term at 9 a.m. Oral on the Wednesday at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, the affidavit attached to articles must state date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after admission on the books of the society as student or articled clerk.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term, shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term. Candidates for Certificates of Fitness are not required to give such notice.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

24. All notices may be extended once, if request is received prior to day of examination.

25. Printed questions put to Candidates at previous examinations are not issued.

FEES.

Notice Fee	$1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM, for 1889 and 1890.

Students-at-Law.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid B. V.
- Cæsar, B. G.d,I.) 33.)

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

Mathematics.

Arithmetic: Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

English.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:—
1889—Scott, Lay of the Last Minstrel.
1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

History and Geography.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy

and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek :—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1889—Lamartine, Christophe Colomb.
1890—Souvestre, Un Philosophe sous le toits.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography ; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.
Arithmetic.
Euclid, Bb. 1., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition ; Smith's Manual of Common Law ; Smith's Manual of Equity ; Anson on Contracts ; the Act respecting the Court of Chancery ; the Canadian Statutes relating to Bills of Exchange and Promissory Notes ; and Cap. 123 Revised Statutes of Ontario, 1887, and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition ; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills ; Snell's Equity ; Broom's Common Law ; Williams on Personal Property ; O'Sullivan's Manual of Government in Canada, 2nd edition ; the Ontario Judicature Act ; R.S.O. 1887, cap. 44 , the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110, 143.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 pér cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles ; Taylor's Equity Jurisprudence ; Hawkins on Wills ; Smith's Mercantile Law ; Benjamin on Sales ; Smith on Contracts ; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons ; Pollock on Contracts ; Story's Equity Jurisprudence ; Theobald on Wills ; Harris's Principles of Criminal Law ; Broom's Common Law, Books III. and IV. ; Dart on Vendors and Purchasers : Best on Evidence ; Byles on Bills, the Statute Law, and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Michaelmas Term, 1888.

BISHOP RIDLEY COLLEGE

OF ONTARIO, LIMITED.

ST. CATHARINES.

A Protestant Church School for Boys, in connection with the Church of England, will be opened in the property well-known as "Springbank," St. Catharines, Ont., in September next, 1889.

Boys prepared for matriculation, with honors in all departments, in any University ; for entrance into the Royal Military College ; for entrance into the Learned Professions. There will be a special Commercial Department. Special attention paid to Physical Culture. Terms moderate. For particulars apply to the Secretary, 26 King St. E., Toronto.

FRED. J. STEWART, *Sec. Treas.*

The Canada Law Journal.

VOL. XXV. MAY 16, 1889. NO. 9

THE general impression has been that Con. Rules 1089 and 1092 practically amended R.S.O., c. 66, so as to abolish the writ of attachment in actions against absconding debtors, and substituted for it an order of attachment. But a reference to 52 Vic. c. 11, Form A. enacted in the last session of the Ontario Legislature, seems to indicate that it is the intention of the legislature to continue the writ of attachment. It is unfortnnate that the Rules and the Statutes are not consistent on this point. The confusion doubtless arises from forgetfulness on the part of our legislature of the changes made by the Rules in the former practice. More careful supervision of legislation, with a view to consistency and clearness, seems a necessity.

THE progress made in other portions of the globe where the English common law forms the basis upon which legislation has been built up, must furnish ground for instructive and profitable reflection. The codification and improvement of law in India, treated of in this number by Mr. Remfrey, a Calcutta solicitor, gives striking evidence of the progress made in that distant part of the empire. In many of the improvements effected in India we see the repetition there of changes which have been made here, but in some particulars the deviations from the English law and practice have been much more radical in India than in Ontario. Some of these departures will doubtless not be regarded by our readers as improvements, others, we think, must commend themselves to everybody. We commend to the consideration of our legislators the mode adopted in India of preventing lack of unanimity on the part of the jury from having its usual harmful consequences.

IT daily becomes more and more apparent that something must be done in the direction of providing another Junior Judge for the County of York. The Division Court business for the City of Toronto has now assumed such immense proportions and is increasing with such rapidity that it is difficult for the present most efficient and industrious Junior Judge to keep the work under. At each of the present monthly sittings the docket is of such size that the Court never lasts less than three days, and frequently five days. The result of this is an unnecessary and great waste of time to litigants, solicitors and witnesses, who have to

hang about the court waiting for what is, generally speaking, some trivial matter. The true remedy for this would be the appointment of a City Judge who would devote his time exclusively to city courts, holding daily sessions. We may refer to this matter again. It is a crying evil, not merely in overworking public servants, but more especially in reference to the enormous expense and interference with business which every month takes place. It has been estimated that it means to the laboring classes, mechanics and small business men a loss in the aggregate of something like seven thousand working days in the year. This would be saved by having daily sittings. This is the main reason why we call attention to this matter. It is not because the work is in arrear; we are only surprised that it is not. We here say nothing of the duties of the junior Judge in assisting at the Sessions and County Court, during which he has either to obtain the services of some deputy or leave the business of these Courts to his senior, who has his hands quite full. This again involves a delay in these Courts and a very large increase in fees to witnesses, Court officials and jurymen.

ON THE CODIFICATION AND IMPROVEMENT OF LAW IN INDIA.

IT is generally admitted that the India of to-day is "a fine country, with a grand future before it," and her rapid material development is beginning to be more fully recognized abroad. Hence we find Manchester spinners sending out a deputation to enquire into her cotton industries; commissioners coming from Japan to study the workings of her chambers of commerce, and the German Chancellor himself sending out an official of the Berlin Foreign Office to study the administrative and economic life of India, our commercial laws, our systems of land tenure, railway policy and administration, external trade, and so on. Bearing this in mind, and remembering that India is advancing all along the line, I think it may interest the readers of this journal if they have placed before them a "cameo" depicting India's improved laws.

In order that the growth of Anglo-Indian law may be perceived, let us glance for a moment at the origin of legislation here.

British law was first introduced into India by the 13th Geo. I., by which the Mayor's Court at Calcutta was established. Prior to this, Englishmen had brought with them only as much of the English law as was applicable to their situation and to the condition of the young settlement: *Advocate-General* v. *Ranll Surnomoye*. The above-mentioned charter was a beneficial one. It neither expressly nor by implication extended to India the Alien laws, Mortmain Act, or any law of forfeiture not then prevalent here: *Est. General Martin*. On the contrary it was especially designed to attract "foreigners" or strangers to this new colony, by providing for a strict and equal distribution of justice. In our silent struggle for supremacy it had its desired effect. Clive having cleared his way, Englishmen gradually began, by the aid of doctoring and diplomacy, to occupy this vast continent. As matters settled down, and the standard of civilization was raised, legislation became desirable, and Regulations of the Bengal

Code were accordingly passed, dealing with the pressing needs of these times. In due course, and in 1834, the Regulations began to be replaced yearly by numerous Acts of the Supreme Legislative Council, affecting different districts or tracts of country in various ways. These enactments were amended and partially repealed, as occasion required, and we thus acquired a rather various assortment of laws.

To come to the present times. Since Her Majesty took over the reins of government from the horrible East India Company, the attention of our legislators has been chiefly directed to the crystallizing of uniform laws having force throughout the whole Indian Empire. The work of codification (suggested, it is said, by Lord Macaulay) commenced with the Penal Code, contemplated many years before, but only introduced by Sir Barnes Peacock in 1860. But with what result? Scarcely a vestige remains of Acts of the Supreme Council previous to 1871. Instead of being obliged to have recourse to countless perplexing and confusing, not to say contradictory, decisions, requiring long study, we now have succinct codes adapted to the peculiar requirements of, and easily understood by, the lay community. Amongst these may be mentioned the following enactments: Indian Penal Code, Indian Succession Act, Indian Evidence Act, and Indian Contract Act (all passed in 1872); Specific Relief Act, Registration Act, and Limitation Act (all passed in 1877); Negotiable Instruments' Act, Joint Stock Company's Act, Transfer of Property Act, Criminal Procedure Code (all passed in 1882), and Landlord and Tenant Act.

Besides putting a stop to suttee and slavery, causing a decided check to infanticide and thuggee, and legalizing the marriage of Hindoo widows, many anomalies deplored in other countries have been swept away or beneficially modified. Let me instance a few which, to British and Canadian lawyers, may seem somewhat strange.

Subject to the obligation to register transfers of land valued at over 100 rupees, no distinction exists between the mode of transfer *inter vivos* in realty and personalty. All estates, both movable and immovable (European and native), devolve in the same channel and on one description of representative, namely, the executor or administrator, and thus we get rid of the useless distinction between the transfer or devolution of realty and personalty which renders English and American systems of law so intricate.

Executors, as persons supposed to have been selected by the testator himself, have full and uncontrolled power to dispose of not only the personal but also the real estates of their testators. So have the administrators of Europeans. The administrators of natives' estates are, after 1st May next, 1889, to be in no way hampered as regards disposal of movables, such as Government securities and shares or outstandings, but it has not been deemed desirable to invest them with disposing power over immovable property, save with the leave of the Court.

Here in India no derivative executorship is recognized in connection with wills or codicils executed, or grants obtained, since the beginning of 1860.

Nor is this all. In India, sealed deeds do not import consideration; simple contracts and documents under seal (known as specialties) stand on the same

footing, and are equally effective. No longer limitation is vouchsafed to the one than to the other.

By the Indian Contract Act the application in India of the historical Statute of Frauds is abolished. Furthermore, as regards Bailments, degrees of care are not defined or recognized, the one rule of ordinary prudence being applied.

Further, the English doctrine to the effect that acceptance of a security for a lesser sum cannot be pleaded in satisfaction of a similar security for a larger sum, has been abrogated; consequently a resident of this country may "pay part in lieu of all," without being harrassed by the thought that he may afterwards be sued for the remainder. Those familiar with the doctrine laid down in the leading English case, *Cumber* v. *Wane*, will appreciate this alteration.

Bengal is said to resemble continental countries "in the absence of any laws of primogeniture and entail, in the clear and indefeasible titles to land, and in the extreme cheapness and facility of its mortgage and sale": Annals of Rural Bengal, by Sir W. W. Hunter. An exception may, however, be mentioned, namely, that in the families of some of the ruling chiefs, primogeniture does prevail, and in some parts of Southern India females succeed in preference to males.

Many of your readers have doubtless heard that in India change of religion now-a-days works no forfeiture of rights, but they may not be aware that according to Act XXI., of 1860, the latter advantage applies to Hindoo converts to Christianity, but not to the Mahommedan faith.

To turn now to the effect, amongst all classes domiciled in India, other than Hindoo, Mahommedans and Buddhists, of marriage on the property of husband and wife. The Indian Succession Act provides that "no person is by marriage to acquire any interest in the property of the person whom he or she marries, or become incapable of doing any act in respect to his or her own property which he or she could have done if unmarried": S. 4, Act X., of 1865. This drastic law, which came into force on 1st January, 1866, naturally made important changes in the common law rights, liabilities and disabilities arising out of the relation of husband and wife, in the case of persons to whom English law had theretofore been applied. As regards property, it abolished by implication the doctrine of unity of persons between husband and wife.

Another apparent variance from English law is, that anything a child may have received from an intestate in his lifetime by way of advancement, is not deducted from its share or brought into "hotchpot."

Our Succession Act also wisely excludes the home rule which enables an executor to pay any creditor, even himself, preferentially to another, by enacting that after the liquidation of funeral and administration charges, and three months' wages due to domestic servants, laborers, or artizans, all debts, however secured, shall be paid rateably. *Ibid*, s. 282.

By another Act no executor or administrator, save an administrator-general, is justified in charging any commission for administering any East India estate.

Even where a legacy is bequeathed to a person named as an executor, he cannot obtain it unless he proves the will or otherwise manifests an intention to act as executor.

In illustration of the desire to encourage the circulation of coin in this hoarding country, I may remark that accumulations of income for one year after a testator's death alone are recognized by our law.

It is interesting that the old rule under which a person changed his domicile by coming to India, unless he was in the service of Government, is abolished, and special modes are laid down for acquiring an Indian domicile.

It may here be mentioned that the provision contained in s. 283 of the Succession Act, that if the domicile of the deceased was not in India the application of his immovable property to the payment of his debts is to be regulated by the law of the country in which he was domiciled, is about to be abrogated by the Probate and Administration Bill now before the Legislative Council. In future all Indian assets are to be distributed, so far as payment of debt is concerned, according to the law of India.

By a clause in the before cited Succession Act, no one having a nephew or niece or nearer relative has power to bequeath property to religious or charitable uses unless the will has not only been executed a year before the testator's death, but within six months of its execution deposited in an office indicated for that purpose. The object of this is to guard against death-bed bequests to charitable uses by persons having near relations.

It is also satisfactory to find that those entitled to trust funds, etc., any portion of which happens to be in the Presidency towns, can have their property placed in charge of the Official Trustee or Administrator-General—officers of Government—and that in the interior of the country, called the "mofussil," the "Court of Wards" often takes over charge of, and superintends to the best advantage, the estates of the infant landed proprietors or married minors. Moreover, a district Judge has power to nominate guardians of the property and persons of minors, and, by the new Bengal Tenancy Act, he is empowered to appoint a common manager when the co-owners cannot amicably agree to collect their rent jointly.

Useful land improvement Acts also exist, under which the Government makes advances to cultivators and others.

Except in regard to persons of whom a guardian has been appointed by a Court, the age of majority of persons of every race, domiciled here, is attained throughout India at 18, instead of 21.

The civil law administered in India, in matters not provided for by native law or custom, is the broad and grand rule of "justice, equity, and good conscience." Personal laws are applied in matters of inheritance, succession and adoption.

Throughout the country the procedure in suits is regulated by a comprehensive civil procedure code of 652 sections, in substitution for eleven enactments containing over a thousand unrepealed sections. It is divided into ten parts, namely, (1) Suits in general, (2) Incidental proceedings, (3) Suits in particular cases, (4) Provisional remedies, (5) Special proceedings, (6) Appeals, (7) Reference to and Revision by the High Court, (8) Reviews of judgment, (9) Special Rules relating to the chartered High Courts, (10) Certain miscellaneous matters.

A defendant may be sued in any court within whose jurisdiction the cause of action arose, or within which he resides, or carries on business, or works for gain. Now-a-days no person, be he prince or peasant, is exempted from the jurisdiction of one or other of the civil courts. Even the Government may be sued in the ordinary way, instead of by petition of right, the Secretary of State for India being made the defendant.

The various steps in a suit in India are somewhat similar to those under the far-famed Judicature Acts. For instance, oral evidence may be supplemented and facts proved by affidavit, by leave of the Court. In civil suits pending before foreign tribunals, witnesses may be examined by interrogations, or *viva voce*, under commission issued by or to any of the High (late "Supreme") Courts of Judicature at Calcutta, Bombay and Madras, etc. Interrogatories may be administered to elucidate facts preparatory to a hearing. In exceptional cases injunctions are awarded by Mofussil Courts. One of the High Court Judges lately severely criticized this power thus:—"A jurisdiction originally belonging only to a Superior Court possessed of legal knowledge and experience is now imposed on a Mofussil Court, which shares with its victims the cruelty of inflicting such powers."

Verified lists of documents are ordered and inspection granted to both sides, after filing of written statement (answer), and subpœnas to witnesses follow in due course: Further information on Indian procedure will be found in R. Bellchamber's Practice of the Civil Courts.

In any suit for money in which the plaintiff is a woman, the Court may at any stage make an order for security for costs, if satisfied "that such plaintiff does not possess any sufficient *immovable* property within British India, independent of the property in suit." It need scarcely be added that my eulogy of India's law does not extend to such a strongly worded section. Whatever may be its true construction, any such power of smothering a just claim is rough on ladies, Europeans and natives alike. To counterbalance this in a measure, no woman can be incarcerated for debt. Even with regard to males, imprisonment under civil process is practically abolished as regards honest debtors.

As regards witnesses, all persons (including husband and wife) capable of giving rational answers to questions put to them are competent to testify for themselves or others in both civil and criminal proceedings. All lawyers are aware that a person may, however, be competent without being compellable, but the rare instances in which the law will not permit a witness to testify, if he be willing, are in the Indian Evidence Act succinctly defined.

According to our Evidence Act the Judge is empowered, in both civil and criminal proceedings, to enquire to the utmost into the truth by putting any questions he pleases in any form to any witness or to the parties about any fact relevant or irrelevant to the matters before him, and he may, of his own motion, order the production of any document or thing.

India is a free country; it has a free press, and its legal codes "secure to all Her Majesty's subjects, without distinction of race or creed, equality before the law": Last speech of Lord Dufferin n Calcutta. The natives of India, of

whom Hindoos and Mahommedans form the bulk, are extremely fond of litigattion, and the legal barometer rises as the weather gets warm. Every native considers it the correct thing to have a law suit in full swing. In fact some think it unconstitutional that the luxury of litigation should be curtailed, as is intentionally done by the Specific Relief Act, which prevents a person suing in respect of any subject he has contracted to refer to arbitration. Fortunately, however, this is a plea which may be effectually waived, as was (unintentionally, of course) done in a late railway case in the old country.

The statute of limitations has not as yet been touched on. Under this head it may be observed that various Acts prescribing the time within which actions can be brought, applications made, and appeals filed, are focussed by Act xv., of 1879. For the convenience of Canadian readers the Indian Limitation Act may thus be summarized:

One year is allowed for actions of tort.

Three years for actions on contracts, simple or otherwise (unregistered), including suits for rent. A customer need, therefore, only preserve receipted bills for three years, instead, as at home, for double that time.

On registered documents, as also on foreign judgments, a six years' limitation is given.

All suits for the recovery of immovable property are in time if instituted within twelve years, and to redeem a mortgage of immovable property sixty years is allowed.

It is noteworthy that the periods prescribed by this Act suffice to extinguish all remedy by suit, save (*a*) in cases of trust or fraud (*b*) where an acknowledgment has been obtained in writing recognizing the claim as of right before expiration of the prescribed period, or (*c*) where the defendant has been for any part of the time absent from India. Lastly, decrees of the High Court can be executed any time within twelve years—but decrees of other courts not less than three years—unless kept alive by execution or notice through the court.

Incidentally it may be remarked that hard and fast rules prevail, by which all courts in India are bound to take cognizance of limitation questions, whether raised by the defendant or not.

Appeals lie to the District Judge, and from thence to the High Courts, and in cases involving over $1,000, across seas to Her Majesty in Council.

Nor has the economic community been forgotten, seeing that our Statute Book also includes Acts regulating Joint Stock Companies generally, and railways, factories, tramways, telegraphs, telephones, shipping and inland navigation in particular.

The United Kingdom standard yard has now become the one legal standard measure of length, in furtherance of the desire for uniformity of weights and measures.

India has in addition the benefit of a law regulating Literary and Scientific Societies, modelled on the lines of the English statute. Authors and inventors are also recognized, for we have a Copyright Act, practically extending English law into the interior. And one of the latest additions to our legal port-

folio is an Inventions and Designs Act, regarding the working of which see the writer's hand-book on Patents, Trade Marks, etc., in India, Ceylon, China, etc.

A "Code of Torts" is also on the legislative anvil.

Time will not suffice at present to dwell on our "Evidence Act" and "Transfer of Property Act," or on various other useful enactments, but we may fairly congratulate ourselves on possessing as fine a body of carefully codified civil laws as any country under the sun.

Now to turn to the criminal laws of British India. These have been consolidated, as witness our Penal and Criminal Procedure Codes, both monuments of legal lore.

It would take far more space than is available to enumerate the various amendments introduced by these codes in Indian criminal law and procedure. Such improvements are well worth attention by lawyers and lawgivers elsewhere. The substantive and adjective laws of India will, I understand, be found carefully collected in two volumes called the "Anglo-Indian Codes," edited by the late Mr. Whitley Stokes, D.C.L., and lately published at the Clarendon Press, Oxford.

Is it not strange that in the British Isles a breach of the seventh Commandment can only be redressed by a civil suit? Why call it *crim. con.*? Here in India this violation of the decalogue is treated in a far severer fashion. By the Penal Code it is declared to be a heinous offence, punishable with five years' rigorous imprisonment. In that respect, also, the West can be taught a lesson by the East. There are, however, not wanting so-called social reformers who utterly fail to appreciate the imperial proportions of our magnificent legal Taj (a "poem in marble" at Agra). Scarcely has the scaffolding been removed from our splendid edifice when they out with their penknives and begin to extract a precious inlaid stone, and to compare it, unfairly, with one taken from that well-built structure, the English Law Amendment Act. Such people need only be reminded of their unveiled zenana customs, and of those sacred usages which render exact accord between English and Indian laws impossible. But I am travelling beyond our codes.

To return. Not only in the Presidency towns but throughout the Mofussil there are government officials (solicitors or pleaders) who act as public prosecutors.

In all civil cases the Judge alone has to decide questions involving both law and fact, whereas in criminal trials he is assisted either by a jury or assessors who decide, or express their opinions on questions of fact, including the meaning of technical terms. This difference in the mode of trial between civil and criminal proceedings is, it will be seen, very marked. It avoids the travesty of justice portrayed by Dickens in *Bardell* v. *Pickwick*: The Pickwick Papers.

An accused person is not to be induced by threat or otherwise to make disclosures, and is not to be subjected to cross examination. Power is given the Court to put questions to him, without previous warning, and at any stage of an enquiry or trial, with a view to explaining any circumstances bearing on

the evidence against him. No oath is administered to the accused, and he is not bound to answer. The Court and the Jury (if any) may nevertheless draw such inferences from his answers or refusal as they think just.

In order to prevent technical objections and the splitting of split hairs, the Court may alter the charge at any time before the verdict of the Jury is returned or the opinions of the assessors are expressed. Amendments must, of course, be explained to the accused, and the trial may thereupon be proceeded with, if not likely to prejudice either side.

As indicating some of the difficulties India magistrates have to encounter, I may, in passing, refer to a curious criminal case I was engaged in a few years ago near Calcutta. A Hindoo was maliciously charged with the murder of his daughter, Kaminee. The *corpus delicti* was not forthcoming. Equal, however, to any emergency, a native policeman produced "some poor fellow's skull" as that of the murdered girl! Another member of the same fraternity, animated by a laudable spirit of rivalry, brought forward a second and smaller skull. It was seriously argued that the girl's skull must be either the one skull or the other. Fortunately for the father, the girl herself arrived in the Magistrate's Court at this critical juncture. On being questioned she told a plaintive tale to the effect that she had been wooed by a Parawala (village policeman). He, finding her father obdurate, had one night secretly sent her up the country by rail, promising to follow. In answer to further questions, the girl declared that neither of the two skulls on the bench was *her* skull. Tableau! The father was, of course, honorably acquitted, and the wicked swain properly punished.

In the High Court, "special" or "common" juries of nine persons assist at every criminal session. Trials before the Court of Sessions at the head station of each district, take place either with a jury (consisting of an uneven number of men, not being less than three or more than nine) or by aid of assessors.

Challenges without grounds are allowed in the High Court as to eight jurors on the part of the Crown and to a like number by the person charged. Besides this in all Sessions cases, objections are allowable "for cause" on various grounds, such as that the juror is under 25 or over 60 years of age; presumed partiality; holding office in or under the Court; being entrusted with police duties, or any other circumstance assigned which, in the opinion of the Court, renders him improper as a juror.

In criminal trials the presiding Judge, at the close of the evidence, after both sides' pleaders have been heard, sums up to the jury the principal points in evidence, explaining how they bear for or against the accused, and, without expressing any opinion, renders them every assistance in coming to a right conclusion.

Nowhere in India is unanimity of the jury required. On the contrary, in Presidency towns, if six out of nine jurors agree, and the Judge concurs, he delivers judgment in accordance with such opinion. In the Court of Sessions the verdict of the majority of the jury prevails when the Judge agrees, but if he disagrees with the jury, or the majority of them, power is given him to refer the whole case to the High Court, which possesses large power of revision. Such a

reference renders country cliques and combinations harmless. The Revising Court will not set aside the verdict of a jury unless patently wrong and perverse, or induced by error in the summing up. On an appeal, the High Court may, instead of quashing or reducing a sentence, enhance it. Our High Court Judges, although arrayed in robes during the criminal sessions, never wear wigs; nor do the counsel; and why? A barrister friend suggests that Indian Judges don't wear wigs simply because a seat on the bench during the hot season would prove to be too trying a situation.

But this article must be trying the reader's patience. Feeling exhausted, some one may exclaim, as did an Indian District Judge one sultry day in June: "I feel faint, give me another *authority*."

The subject of the codification and improvement of law in India is naturally far too extensive to admit of exhaustive treatment in a few pages, and it remains for your readers to say whether the above remarks do not demonstrate that in the domain of well-considered law reform India is abreast with, if not ahead of, Britain, and other countries following directly in her wake.

In conclusion. If it be true that "it is upon the law and government that the prosperity and morality, the power and intelligence of a nation depend," British India may be congratulated on its legislative system. Although her laws are not faultless, her legal machinery works smoothly, and may in the near future furnish food for aspiring jurists in other progressive countries.

H. H. REMFRY, F.M.Inst.. P.A., M.S.C.I., Solicitor.

Calcutta, April 3rd, 1889.

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE Law Reports for April comprise 22 Q.B.D., pp. 393-536; 14 P.D., pp. 41-50; and 40 Chy.D., pp. 385-519.

PRACTICE—PENAL ACTION—DISCOVERY—ACTION FOR TREBLE DAMAGES FOR POUND BREACH, ETC., UNDER 2 W. M., SESS. 1, C. 5. S. 4.

In *Jones* v. *Jones*, 22 Q.B.D., 425, a Divisional Court, composed of Lord Coleridge, C.J., and Hawkins, J., decided that an action for pound breach and rescue of chattels distrained for tithe rent charge, in which the plaintiff claims treble damages under 2 W. & M., sess. 1, c. 5. s. 4, is a penal action, and the plaintiff, therefore, is not entitled to an affidavit of documents.

PRACTICE—EQUITABLE EXECUTION—RECEIVER—MILITARY OFFICER—RETIRED PAY—COMMUTATION OF RETIRED PAY.

In *Crowe* v. *Price*, 22 Q.B,D., 429, an application was made for the appointment of a receiver by way of equitable execution of a sum of money belonging to the judgment debtor, who was a retired military officer, standing in the bankruptcy estates' account of the Bank of England to his credit, on the annulment of his bankruptcy; and which consisted partly of a sum paid to the trustee out of the retired pay of the judgment debtor, and partly of a sum paid to the trustee

by the Government in respect of the commutation of part of his retired pay. It was held by Lord Coleridge, C.J., and Hawkins, J., that the creditor was entitled to the appointment of a receiver in respect of the commutation money, but not in respect of the retired pay; and the decision was affirmed by the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) as regards the retired pay; no question being raised on the appeal as to the other money.

MANDAMUS—PREROGATIVE WRIT—RAILWAY COMPANY TRANSFER OF SHARES—REFUSAL TO REGISTER —REMEDY BY ACTION.

The Queen v. *Lambourn Valley Ry. Co.*, 22 Q.B.D. 463, was an application for a prerogative writ of mandamus, on behalf of a shareholder of the defendant railway company, to compel the company to register a transfer of shares which the applicant had made to an insolvent person, in order to avoid liability for future calls. The company refused to register the transfer. A rule *nisi* having been granted, it was, after argument, discharged by Pollock, B. and Manisty, J., on the ground that the prosecutor had another specific and sufficient remedy, viz.: by action of mandamus, and, therefore, the prerogative writ ought not to issue.

BUILDING SOCIETY—SUBSCRIPTION SHARES—WITHDRAWAL—WINDING UP—CONTRIBUTORY.

In re the Sheffield and South Yorkshire Building Society, 22 Q.B.D. 470, a Divisional Court (Cave and Charles, JJ.) decided a question affecting the liability of shareholders in Building Societies, which it may be useful to notice. By the Building Societies' Act, 1874 (37, 38 Vict. c. 42), s. 14, the liability of any member of any society under the Act in respect of any shares upon which no advance has been made is limited to the amount actually paid, or in arrear, on such shares. By s. 16, the rules of every Building Society are to set forth the terms upon which shares may be withdrawn. Members of a Building Society incorporated under the Act, who had investing shares payable by monthly subscriptions, and upon which no advance had been made, gave due notice of withdrawal and received the estimated amount of their shares under the rules of the Society before the shares were fully paid up or matured. Within a year afterwards the Society was ordered to be wound up, and the Judge of the County Court, on the application of the creditors, made an order declaring that the holders of such shares not matured at the commencement of the winding up, notwithstanding withdrawal, were liable to contribute to the assets of the Society to the extent to which their shares should be deemed to be in arrear at the commencement of the winding up; and that the extent to which such shares should be deemed to be in arrear was the amount of subscription which became payable prior to the winding up, with interest and fines. But it was held that this order was wrong, and that on the withdrawal of the shares pursuant to the rules of the Society, the holders thereof ceased to be members of the Society, and no amount was in arrear, and that they were not liable at law, or in equity, to contribute to its debts within the meaning of s. 200 of the Company's Act.

INSURANCE, MARINE—WARRANTY—"IRON," "STEEL."

In *Hart* v. *the Standard Marine Insurance Co.*, 22 Q.B.D. 499, the Court of Appeal (Lord Esher M.R., Bowen and Fry, L.JJ.), affirming the decision of

Mathew, J., held that a policy of insurance on a ship which contained a clause "warranted no iron, or ore, or phosphate cargo, exceeding the net registered tonnage," was forfeited by shipping a quantity of steel in excess of the net registered tonnage.

INSURANCE AGAINST INJURY—"EFFECTS OF INJURY CAUSED" BY ACCIDENT—DEATH FROM OTHER CAUSES, HASTENED BY ACCIDENT—POWER OF ARBITRATOR TO STATE SPECIAL CASE UNDER C.L.P ACT, 1854, S. 5 (R.S.O. C. 53, S. 35).

Isitt v. *Railway Passengers' Assurance Co.*, 22 Q.B.D. 504, was an action upon an accident policy granted by the defendants against "death from the effects of injury caused by accident." The assured fell and dislocated his shoulder. He was at once put to bed, and died in less than a month from the date of the accident, having been all the time confined to his bedroom. In a case stated in a reference under the defendant's Special Act, the arbitrator found that the assured died from pneumonia, caused by cold, that he would not have died as, and when, he did, but for the accident; that as a consequence of the accident he was rendered restless, unable to wear his clothing, weak and unusually susceptible to cold, and that his catching cold, and death, were both due to the condition of health to which he had been reduced by the accident. Huddleston, B., and Wills, J., under these circumstances were unanimously of opinion that the death of the assured was due "to the effects of injury caused by accident," within the meaning of the policy. The Act providing for the reference to arbitration of clauses arising under the policy, also provided that the submission might be made a rule of Court, and the Court was of opinion that the umpire in the reference had power to state a special case for the opinion of the Court under the C.L.P. Act, 1854, s. 5 (see R.S.O. c. 53, s. 35). Huddleston, B., says at p. 511, "The question of law is, then, whether or not, as a matter of law, the chain of circumstances ought to be taken as 'effects' under this insurance. Construing, as I do, the terms of the insurance as meaning that the injury must be immediately caused by the accident, but that the death need not be immediately caused by the injury, I answer this question in the affirmative. I think the circumstances which followed were, in the contemplation of law, 'effects' of the injury."

PRACTICE—COSTS—JOINT DEFENDANTS IN ACTION OF TORT—DEFENDANT SEVERING IN PLEADING—LIABILITY OF DEFENDANTS FOR COSTS OF SEPARATE PLEADING.

In *Stumm* v. *Dixon*, 22 Q.B.D. 529, the Court of Appeal (Lord Esher, M.R., and Fry, L.J.) were divided in opinion on a question of practice. The action was one of tort against two defendants, who had severed in their defence; the plaintiff recovered judgment against both, with costs, and the question arose whether both defendants were liable to all the costs of the action. The Divisional Court held (see *ante*, p. 145) that the defendant who delivered a separate defence was alone liable to the plaintiff for the costs so occasioned, and that the other defendant was not liable for the costs. And in this opinion Lord Esher concurred, but Fry, L.J., was of the opinion that both defendants were jointly and severally liable for all the costs. Lord Esher considered it against natural justice to hold otherwise, and the only authority on the point, *Wilson* v. *Foore*,

cited in Buller's "Nisi Prius," 7th ed., p. 335, he considered "unsatisfactory," and wrong in principle, and he refused to follow it. Fry, L.J., on the other hand, considered that where an action is tried by a jury, under the rules the costs are to follow the event, unless the Judge or the Court "shall for good cause otherwise order." The plaintiff consequently has a right to costs against both defendants, and it is for the Court or Judge, and not the Master, to modify the effect of the rule. At p. 536 he says "In my opinion the effect of the rule which has been laid down by the Master of the Rolls would be to vest in the Master a discretion which, by virtue of the rule, belongs only to the Judge."

PROBATE—WILL—EXECUTION IN THE FORM OF A DEED—ATTESTING WITNESS UNABLE TO RECOLLECT EXECUTION.

In *the goods of Colyer*, 14 P.D. 48, probate was granted of a will executed in the form of a deed, notwithstanding that the witnesses, though proving their signatures and that of the testator, were unable to swear positively as to the circumstances of its execution.

PROBATE—WILL—PARTIAL, OR TOTAL REVOCATION.

In *Treloor* v. *Lean*, 14 P.D. 49, the facts were that the testator, after duly executing his will, which was in five sheets, each of which was signed by himself and initialled by the attesting witnesses, took out three sheets and substituted three new ones, which he signed, but which are not attested. He did not alter the date of the will nor did he re-sign it, nor was it re-attested. Butt, J., held that the will was not entitled to probate, and with the consent of the parties, pronounced for an intestacy.

VENDOR AND PURCHASER—POWER OF SALE—COMPANY—SALE BY MORTGAGEE TO COMPANY IN WHICH HE IS A SHAREHOLDER.

Farrar v. *Farrars*, 40 Chy.D. 395, was an action brought by a mortgagor to set aside a sale made by the mortgagee under the power contained in the mortgage, on the ground that the sale had been made to a Company in which the mortgagee was a shareholder. It was held by Chitty, J., and affirmed by the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.), that the sale could not be set aside merely on the ground of the relationship between the mortgagee and the purchasers, but that the existence of that relationship, which was known to the purchasers, created such a conflict of interest and duty as to throw upon the purchasers the burden of upholding the sale, and that the Company had discharged themselves of this burden by showing that the mortgagee had taken all reasonable pains to secure a purchaser at the best price, and that the price given was not at the time inadequate, though more might have been obtained by postponing the sale. Lindley, L.J., who delivered the judgment of the Court of Appeal, says at p. 409: "A sale by a person to a corporation of which he is a member is not, either in form or in substance, a sale by a person to himself. To hold that it is would be to ignore the principle which lies at the root of the legal idea of a corporate body, and that idea is that the corporate body is distinct from the persons composing it. A sale by a member of a corporation to the corporation

itself is in every sense a sale valid in equity as well as at law. There is no authority for saying that such a sale is not warranted by such a power." But while saying this, he proceeds to point out that such a sale may be void on the ground of fraud, or for being made at an under value, or under such circumstances as to throw upon the purchasers the onus of proving its validity. Further on he says, at p. 415: "Although a sale by a mortgagee to a company, promoted by himself, of which he is the solicitor, and in which he has shares, is one which the company must prove to have been *bona fide* and at a price which the mortgagees could properly sell, yet if such proves to be the fact, there is no rule of law which compels the Court to set aside the sale."

COPYRIGHT—NEWSPAPER—ARTICLES COMPOSED AT THE JOINT EXPENSE OF PROPRIETORS OF SEVERAL NEWSPAPERS—IMPERIAL COPYRIGHT ACT (5 & 6 VICT., C. 4, 5, SS. 18, 19).

Trade Auxiliary Co. v. *Middlesborough*, 40 Chy.D. 425, was an action for the infringement of a copyright. The plaintiffs were the three several proprietors of three several periodicals, and they had jointly employed a person to compile for them lists of registered bills of sale and deeds of arrangement, on the terms that the copyright was to belong to the plaintiffs. The three periodicals were registered under the Copyright Act. The compilation of the lists required skill, and involved a good deal of labor and expense. The defendant association copied and circulated among their own members so much of these lists as related to their own neighborhood, which was a very small part of the whole. The Court of Appeal (Cotton, Lindley and Lopes, L.JJ.), affirming Chitty, J, decided that the 18th section of the Statute was not to be construed as confining the copyright of a proprietor of a newspaper to articles composed on the terms that the copyright should belong to, and be paid for by, him alone, but that each of the plaintiffs had an interest in the copyright, and, having registered his periodical, had a right to sue to restrain the infringement, and that the defendants could not escape liability on the ground that they had only copied a small portion of the lists: See also *Cate* v. *Devon*, 40 Chy.D. 500. This Statute, we may remark, is one of the few Imperial Statutes in force in Canada, *proprio vigore.*

TRUSTEE—DISCLAIMER BY CONDUCT—LEGAL ESTATE.

In re Birchall, Birchall v. *Ashton*, 40 Chy.D. 436, was an action for the appointment of new trustees in place of a deceased trustee and the defendant, who, it was alleged, had by his conduct disclaimed the trusts. Bristowe, V.C., before whom the action was tried, found that the defendant had by his conduct disclaimed the trust, and directed a reference to appoint new trustees, and ordered the defendant, at the expense of the trust estate, to execute a proper conveyance of the trust estate to the new trustees. On appeal by the defendant, the Court of Appeal (Cotton, Lindley and Lopes, L.JJ.) refused to disturb the finding of Bristowe, V.C., as regarded the fact of the disclaimer, but having found that there had been a disclaimer of the trust, they held that he was wrong in directing the disclaiming trustee to convey, and they, therefore, struck out that part of his order. Cotton, L.J., says at p. 439: "I should be sorry that it should be

thought that a trustee could disclaim the office of trustee, and nevertheless take the legal estate."

MORTGAGE—SOLICITOR AND CLIENT—EXPECTANT HEIR—BONUS—COLLATERAL ADVANTAGE—CHAMPERTY—REDEMPTION.

James v. *Kerr*, 40 Chy.D. 449, was an action for redemption. The plaintiff being in poor circumstances, was defendant in a probate action, in which he claimed a share of certain real estate as co-heir of the deceased. He borrowed money from the defendant, who was a solicitor, to enable him to conduct his defence, and executed a mortgage on his interest in the land in question, whereby he covenanted to employ a particular solicitor in the action, and if he was successful to pay the defendant £225 "by way of bonus," and charged the estate with the payment of the sum advanced and interest at 5% and the £225 bonus. The plaintiff succeeded in his claim in the probate action. It was held by Kay, J., that the mortgagee was entitled to redeem on payment only of the sum actually advanced, with interest, and that he was not bound to pay the £225; that the mortgage was tainted with champerty, and the bonus was a collateral advantage which the mortgagee could not legally stipulate for, and that the transaction was voidable as an undue advantage obtained from the plaintiff under the pressure of distress. At p. 460 he says: "I believe, with Lord Romilly, that the rule that a mortgagee should not be allowed to stipulate for any collateral advantage beyond his principal and interest did not depend on the laws against usury. The rule was entirely independent of the rate of interest charged. There seems less reason than ever for allowing it, now that persons may agree upon any rate of interest they please."

HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—GIFT BY WIFE TO HUSBAND—CAPITAL—INCOME.

In re Flamank Wood v. *Cook*, 40 Chy.D. 461, was a claim by a widow to rank as a creditor against her deceased husband's estate. It appeared that she was entitled to a sum of money for her separate use under a will. A mortgage for a larger sum held in trust for the testatrix was in 1867 transferred by the claimant and another person, as executors of the trustee, to the husband of the claimant, he paying out of his own money the difference between the amount due on the mortgage and the amount due to his wife. In 1869 the husband sold the mortgaged property and received the purchase money, and his wife and the other executor of the original mortgagee, as such executors, concurred in the conveyance to the purchaser. The husband applied the purchase money to his own use. The husband and wife lived together in amity until the husband's death in 1885, and no proceedings were ever taken by the wife in respect of the money so received, nor did she receive any income in respect thereof. By his will, made in 1860, the husband gave his wife a life interest in his property. She now claimed to rank as a creditor on his estate for the sum received in 1867, with subsequent interest. She denied that she ever gave him authority to receive the money, and there was evidence that she objected to his receiving it, and she did not appear to have had any separate advice in the matter. Under these circumstances

it was held by Kay, J., that the onus lay on those claiming under the husband to prove a gift of the capital sum from the wife to the husband, and that they had failed to do so, and therefore the widow's claim as a creditor must be allowed; but as to the interest which had accrued during the lifetime of her husband, he disallowed the claim as to that.

INTEREST ON COSTS PAYABLE OUT OF AN ESTATE.

In re Marsden's Estate, Withington v. *Neumann*, 40 Chy.D. 475, Chitty, J., held that where, in an administration action, costs have been directed to be taxed, and paid by the trustees out of a testator's estate, with a direction for the division of the fund after such payment amongst the persons beneficially interested, interest is not, in the absence of special direction, payable on the costs. See *Archer* v. *Severn*, *ante* vol. 24, p. 617.

CHAMPERTY—MAINTENANCE—TRUSTEE IN BANKRUPTCY—ASSIGNMENT OF SUBJECT MATTER OF ACTION.

Guy v. *Churchill*, 40 Chy.D. 481. This was a motion to discharge an order of course to continue proceedings, obtained under the following circumstances: Pending the action the plaintiff became bankrupt, and the trustee in bankruptcy being unwilling to assume the risk of carrying on the action, assigned the cause of action to a creditor in trust for himself and certain other creditors of the bankrupt, on the terms that anything that might be recovered (after deducting actual disbursements) was to be divided in four parts, three of which were to belong to the assignee and one to the assignor. The assignee having obtained an order to continue the proceedings in his own name, the defendants moved to set it aside on the ground that the assignment was champertous; but it was held by Chitty, J., that the principle of the decision in *Seear* v. *Lawson*, 15 Chy.D. 426, applied, and that the fact that some of the creditors were to carry on the action at their own risk and expense, and to take a larger share of the fruits of the action than they otherwise would have done, did not bring the case within the law against champerty and maintenance, and that the transaction was one permitted by the bankruptcy laws: but apart from the bankruptcy law and the relationship of the parties, the assignment would be void for champerty. At p. 488 he says: "Maintenance is called the genus of an offence, of which champerty is a species"; and at p. 489: "Champerty is but a form of maintenance, though it be maintenance aggravated by an agreement to have part of the thing in dispute. . . . Maintenance when spoken of in the books means unlawful maintenance. But the maintenance of the suit of another is lawful when the persons maintaining have an interest in the thing in variance. For instance, where a *chose in action* is vested in a trustee, the beneficiaries may, by providing a fund for the expenses of the action, and by other means, not in themselves unlawful, assist in maintaining the suit."

SOLICITOR—COSTS—TAXATION AFTER TWELVE MONTHS AFTER PAYMENT OF BILL—THIRD PARTIES—COSTS IMPROPERLY PAID TO SOLICITOR OUT OF TRUST ESTATE.

In re Jackson, 40 Chy.D. 495, was an application by third parties interested in an estate to have the bill of costs of a solicitor who had been employed by

the administratrix, and whose bill had been paid by her out of the estate, referred to taxation. It was suggested that the bill contained items not properly chargeable against the capital of the trust estate, and that the solicitor knew that he was being paid out of the capital, and had notice of the breach of trust at the time he received payment. More than twelve months had elapsed since payment, and the application was therefore refused. See *Wilson* v. *Beatty*, 9 App.R. 149.

COPYRIGHT—INJUNCTION—PERIODICAL.

In *Cate* v. *Devon*, 40 Chy. D. 500, it was held by North, J., that it is not necessary that the name of the proprietor nor the title of the paper should be registered under the Newspaper Libel and Registration Act, 1881, in order to entitle the proprietor to sue to restrain an infringement of copyright matter appearing in such paper.

REPAIRS—TENANT FOR LIFE—EXPENDITURE OF TRUST MONEY—JURISDICTION.

The only remaining case to be noted is *Conway* v. *Fenton*, 40 Chy.D. 512, in which Kekewich, J., held that where land and money were vested in trustees of a settlement for the benefit of a husband and wife for their lives, and after their death for their children, the Court had original jurisdiction to sanction the expenditure of part of the money in repairing buildings on the land which were so much out of repair as to make the land untenantable. *Sed vide Re Smith's Trusts*, 4 O.R. 518.

Notes on Exchanges and Legal Scrap Book.

SIR CHARLES RUSSELL, Q.C., M.P.—"To few men under the age of fifty has it been given to attain the success of Mr. Charles Russell, who now stands by general consent at the head of the unofficial Bar. In the full vigor of life, with a large and lucrative practice, it is not to be wondered at that he has refused a judgeship, reserving himself for yet higher honors, or at all events deferring his acceptance of the *otium cum dignitate* of the Bench. The record of his contests and triumphs is familiar to everyone who reads the reports; and in every case it may fairly be said, whatever an advocate could honorably do for his clients Mr. Russell has done." So spoke *Pump Court* in its first issue—now many years ago. Since that time we have seen him add triumph to triumph, until he has achieved the crowning glory of his career in the masterly conduct of the case for the Parnellite members before the commission, and in the brilliant address he has just delivered, wherein indeed we saw learning made lovely with eloquence. Since that time he became Attorney-General in Mr. Gladstone's last administration, and during the short time he held that office was universally acknowledged to have borne his honors well. Sir Charles commenced life as an

articled clerk to a Dundalk solicitor, but speedily found that the lower branch of the profession of the law would not give him the scope he required for the exercise of his powers and the aims of his ambition. He therefore boldly abandoned the path on which he had entered when his prospects of success were already assured, and commenced, *de novo*, as a student of the Honorable Society of Lincoln's Inn. In 1859 he was called to the Bar, and connecting himself with the Northern Circuit, soon established his reputation as a sound lawyer, an acute cross-examiner, and eloquent advocate. In Liverpool, especially, his abilities were promptly recognized; and in the Court of Passage, as well as Sessions and Assizes, his briefs were numerous and important. The late Edwin James, Q.C., Mr. Justice Brett, and Lord Justice Holker were amongst the men with whom he had to compete, and his reputation steadily grew, both among his professional brethern and with clients, so that his succession to Sir John Holker as leader of the Northern Circuit was acquiesced in by universal consent.

What Sir Charles Russell is in court is well known, and we need not dwell on the steady incisiveness with which he extracts the truth from an unwilling witness, or the clear precision with which he places the salient points of a complicated case before a jury. Out of court, he is a charming companion, witty in conversation, and an appreciative listener in his turn. He takes an interest in sport of every kind, and thoroughly enjoys the turf. So well is he appreciated in the sporting world, that when the celebrated question about the identity of Bend Or was raised, briefs for both plaintiff and defendant were sent for his acceptance, and now in every sporting case both sides hope to be first to retain his services. In a rubber at whist, at picquet, and, in fact, in nearly every game, he is able to excel by means of the same mental qualities of coolness, readiness, and decision which account for his success in more weighty matters. The Anti-Tocacco Society may be interested to learn that Sir Charles Russell is remarkable as one of the few thorough-going snuff-takers of the day, and appears to enjoy intensely the stimulating pinch.

As a member of Parliament, since his election for Dundalk, in 1880, up to now, when he represents South Hackney, Sir Charles has won the ear of the House of Commons to a remarkable degree for a lawyer, and, as an Irish Liberal, even when he declined altogether the leadership of Mr. Parnell, he exercised an important influence in the course of Mr. Gladstone's measures of conciliation for Ireland. He has always advocated with earnestness and moderation the cause of his countrymen, and his tact has often gained what the obstructive system of some of his colleagues had almost lost. It must now be written of him that, with his political chief, Mr. Gladstone, he has at length unreservedly accepted the leadership of Mr. Parnell. Sir Charles, like all really great men, is always kindly and generous in his treatment of promising juniors, and is highly popular on his circuit. No man could be found more thoroughly representative of his profession. It is now some fifteen years since Sir Charles took silk, but he seems as sprightly now as the first day he was called within the Bar, and, like Mr. Gladstone, age seems only to ripen his intellect without impairing his vigor. —*Pump Court.*

INFANTS' LIABILITY IN TORT AND CONTRACT.—Infancy has in the eyes of the law many privileges, but the decision of Mr. Justice Kay in *Re Seager, Seeley* v., *Briggs* establishes a limit for them. There an infant misappropriated money, which he had received on behalf of his master's employers. On being accused, he admitted the truth of the allegation, and when he attained his majority signed a memorandum acknowledging that he owed the amount stated and costs, promising to pay within a week, and charging a certain sum of money, to which he had become entitled under a will, with payment thereof. He also authorized the trustees to pay the sum to his master, and the latter took out a summons for payment. The 1st section of the Infants' Relief Act, 1874, makes all contracts entered into by infants for repayment of money lent or to be lent or for goods supplied or to be supplied (except necessaries), void, and the 2nd section provides "that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." It would have been stretching the meaning of this section, if the memorandum, signed after the infant came of age, had been held a ratification, and Mr. Justice Kay declined so to decide; and further holding that the charge was given to prevent an action in tort being brought against the boy, who was liable *ex delicto* not *ex contractu*, allowed the summons with costs. To determine, then, whether the Act applies, the crucial test would seem to be, does the alleged liability arise from a contract or a tort? If it arises from any contract, then no ratification will be of any use: *Ex parte Kibble; Re Onslow*, 32 L. T. Rep. N.S. 138; 10 Ch. App. 373. Indeed, so far-reaching is this rule that a person will not be held liable for a breach of promise of marriage made in infancy, and subsequently ratified (*Coxhead* v. *Mullis*, 39 L. T. Rep. N.S. 349; 3 C.P. Div. 439), unless there is evidence that what subsequently took place was intended as a new promise and not a ratification of the former one (*Northcote* v. *Doughty*, 4 C.P. Div. 385; *Ditcham* v. *Worrall*, 43 L. T. Rep. N.S. 286; 5 C.P. Div. 410); and "it is not enough to give evidence of language, which is equally consistent with ratification of the old promise as with a fresh promise:" per Mr. Justice Charles, in *Holmes* v. *Brierly*, 58 L. T. Rep. N.S. 70. So strict is the rule that an infant cannot contract, that he was not bound at law if he induced the other party to enter into the contract by a fraudulent representation that he was of age: Simpson on the Law of Infants, p. 79. The doctrine of equity, however, which, since the Judicature Acts, presumably applies to all the divisions of the High Court, is that not even an infant can take advantage of his own fraud: *Ib.*; and Kerr on Fraud and Mistake, 2nd edit. p. 122. This is in reality hardly an exception to the rule, but rather an example of the crucial test, as the infant is not strictly made liable because he has contracted, but on account of the wrong his conduct has inflicted on the other party: Pollock on the Principles of Contract, 3rd edit. p. 75. If the other party is not deceived by the infant's false representation, then, as no wrong is done to that person, the privilege of infancy remains: *Nelson* v. *Stocker*, 33 L T. Rep. N.S. 277; 4 DeG & J. 458.—*Law Times.*

DIARY FOR MAY.

1. Wed.....St. Philip and St. James.
2. Thur.....Admission of graduates and matriculants. J. A. Boyd 4th Chan. 1881.
3. Fri.....Mr. Justice Henry, died 3rd May, 1888.
4. Sat.....Last Day for filing papers and fees for final examination.
5. Sun.....*Second Sunday after Easter.*
6. Mon.....Supreme Court of Canada sits. 1st Intermediate Exam. Lord Brougham died 1868, aet. 90.
9. Thur.....2nd Intermediate Examination.
12. Sun.....*Third Sunday after Easter.*
14. Tue.....Court of Appeal sits. Gen. Sess. and Co. Ct. Sitt. for trial in York begin. Solicitors' Examination.
15. Wed.....Barristers' Examination.
19. Sun.....*Fourth Sunday after Easter.*
20. Mon.....Easter term commences. High Court Justice Sittings begin.
21. Tue.....Confederation proclaimed 1867. Lord Lyndhurst born 1772.
24. Fri.....Queen Victoria born 1819.
26. Sun.....*Rogation Sunday.*
27. Mon.....Habeas Corpus Act passed 1679.
28. Tue.....Battle of Fort George 1813.
30. Thur.....Ascension Day.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

MACLENNAN *v.* GRAY.

Registry laws—Priorities—Unregistered mortgage—Dower.

R. G. and J. G. being the owners subject to the dower of their mother R., and an annuity in her favour, of certain lands, mortgaged them to one C., to secure advances made by him to them. R. knew of the mortgage and was asked, but refused, to execute it. Subsequently R. G. and J. G. mortgaged the lands to the plaintiffs to secure advances made by them. R. released all her claims for the purpose of this mortgage, but received no benefit from the advances. This mortgage was taken by the plaintiffs without any notice of the mortgage to C., and was registered before it, and gained priority over it. Under this mortgage the lands were sold, and after payment of the claim of the plaintiffs a surplus remained, which R. claimed in priority to C.

Held, reversing the decision of BOYD C., (reported 16 O.R. 321), that she was not entitled to priority. The priority gained by the plaintiffs by force of the Registry Act did not enure to her benefit, as she was not a purchaser or mortgagee, nor did that priority enure to her benefit as surety by virtue of the doctrine of subrogation because that doctrine could not be invoked to defeat the honest claims and superior equities of third persons.

H. J. Scott, Q.C., for the appellant.

R. E. Kingsford, for the respondent.

THE ONTARIO LOAN AND DEBENTURE CO. *v.* HOBBS.

Mortgage — Re-demise clause — Landlord and tenant—Right to distrain.

On the 31st day of May, 1883, one D. mortgaged to the plaintiffs certain lands to secure the sum of $20,000 then advanced by them to him. The advances were repayable as follows: $500 on the 1st day of December, 1883; $500 in each of the months of June and December in each of the four following years; and $15,500 on the 1st day of June, 1888; together with interest at the rate of seven per centum per annum from the 1st day of June, 1883, to be paid half-yearly on the 1st days of June and December in each year. The mortgage was made in pursuance of the Act respecting Short Forms of Mortgages, and contained the following clause, described in the margin as "Re-demise clause":

"And the mortgagees lease to the mortgagor the said lands from the date hereof until the date herein provided for the last payment of any of the moneys hereby secured undisturbed by the mortgagees or their assigns, he (the mortgagor) paying therefor in every year during the said term on each and every of the days in the above proviso for redemption appointed for payment of the moneys hereby secured, such rent or sums as equal in amount the amount payable on such days, respectively, according to the said proviso, without any reduction. And it is agreed that such payments when so made shall respectively be taken and be in all respects in satisfaction of the moneys so then payable according to the said proviso."

The mortgage did not contain any statutory distress clause, or the statutory clause providing for possession by the mortgagor until default, or any attornment clause, and it was not executed by the mortgagees. At the time it was given, D. was himself in occupation of several of the properties comprised in it, of the

annual rental value of $1,200, while the other properties comprised in it were in the occupation of tenants of D., and were producing an annual rental of about $2,000. After the execution of the mortgage, the properties continued to be occupied in the same manner by D., or his tenants, and payments under the mortgage were duly made by D. In 1887 the goods of D. on one of the properties comprised in the mortgage and occupied by him were seized under executions against him and sold, and the plaintiffs claimed as landlords that the proceeds of the sale should be applied first in payment of the amount due to them for the upaid instalments of principal and interest of June and December, 1886.

Held, reversing the decision of the Divisional Court of the Queen's Bench Division (reported 15 O.R. 440), that this claim was well founded, the relation of landlord and tenant having been validly created between the parties, and the execution creditors in the absence of fraud not being entitled to complain.

Moss, Q.C., and *A. O. Jeffery*, for the appellants.

W. R. Meredith, Q.C., for the respondents.

RYAN *v.* CLARKSON.

Assignment for the benefit of creditors—Costs of creditor having execution in sheriff's hands—R.S.O., c. 124, s. 9.

Held, BURTON J.A., dissenting, affirming the judgment of ARMOUR, C.J., that under R.S.O., c. 124, s. 9, the costs for which an execution creditor has a lien, are the costs not of the execution only, but all the usual costs which could be recovered from the debtor under an execution.

Foy, Q.C., for the appellant.

Idington, Q.C. for the respondent.

LEMAY *v.* MACRAE.

Arbitration and award—Motion to set aside award—Admissions of arbitrator as to grounds upon which he proceeded—Draft award setting out grounds.

Held, affirming the judgment of ARMOUR, C. J., reported 16 O. R., 307, that where the action and all matters of account and counter claim therein, and all matters in difference between the parties were by consent referred to the arbitration and final end and determination of a named person, and no provision was made for an appeal, his award, valid on its face, could not be attacked because of alleged errors in the principle upon which he proceeded, this principle being disclosed in a draft award not delivered with, or forming any part of, the formal award, and in conversations after the making of the award between the arbitrator and one of the solicitors for the attacking party. There being no misconduct or mistake of jurisdiction shown, the Court could not interfere.

East & West India Co. v. *Kirk*, 12 A.C., 738, considered.

Robinson, Q.C., and *A. Ferguson* for the appellant.

Delamere and *F. H. Keefer* for the respondents.

FERGUSON *v.* KENNEY.

Voluntary conveyance—Right of creditor to attack on ground of continuous indebtedness of grantor to him on current account.

The defendant made a voluntary conveyance to his wife of certain real estate owned by him. Without this real estate, his liabilities, among which was a debt to the plaintiffs of about $1,500, exceeded his liabilities. He continued to deal largely with the plaintiffs down to the time of his failure some years afterwards, the balance then due them being about $2,300, but much more than $1,500 having been in the meantime paid to them.

Held, that in the case of a continuous dealing and account where the customer goes on paying with one hand on general account and purchasing fresh goods with the other hand to an equal or larger amount, with a constantly increasing balance against him, the creditor is from the commencement of such dealing, so long as his ultimate balance remains unpaid, in a position to attack an alleged voluntary conveyance.

Decision of BOYD, C. affirmed.

Moss, Q.C., and *A. C. Galt* for the appellants.

Geo. Kerr, jun., and *Duggan* for the respondents.

IN THE MATTER OF THE CENTRAL BANK OF CANADA—BAINES' CASE.

Banks and banking—Winding-up Act—Subscription for shares—Transfer of shares—Shareholders within one month of suspension—R.S.C., c. 120, ss. 20, 70, 77.

One B. subscribed for twenty-five shares of the capital stock of the Central Bank of Canada, but did not at the time of subscription nor within thirty days thereafter make any payment thereon. About eight months later, however, payment was made by D. to the Bank, and the Bank accepted payment from him, of twenty per cent. of the amount subscribed, and subsequently dividend cheques were issued by the Bank in favor of B., were endorsed by him, and were paid.

Held, MACLENNAN, J.A., dissenting, affirming the decision of BOYD C. (reported 15 O. R.295), that, the original signature remaining unobliterated, the subscription was revived and became complete as soon as payment was made, and no fresh signature was necessary.

Per MACLENNAN, J.A. The payment not having been made within the prescribed time, the original subscription was void, but the subsequent payment accepted by the Bank, and the endorsement by B. of the dividend cheques, operated as a new subscription.

No special directions as to the transfer of shares had been formally adopted by the directors, but the transfer book had been prepared and adapted to the system of marginal transfer. One C. transferred certain shares in blank, subject, by marginal note, initialled by C., to the order of a broker and subject to a subsequent marginal note, initialed by the broker to the order of B. B. signed an acceptance of the shares immediately under the transfer in blank signed by C., and was entered in the books of the Bank as the holder of the shares, the intermediate transfers to and from the broker being omitted. The transfer to B. and the acceptance by him took place within a month of the time of the suspension of the Bank.

Held, affirming the decision of BOYD, C., that this transfer and acceptance were a sufficient compliance with, or at least not in any way a violation of, the statutable provisions, and that B. became the legal holder of the shares and was liable as a contributory.

Sections 70 and 77 of the Act must be read together and make liable as contributories all those who hold shares at the time of the suspension of the Bank, or who have held shares at any time within one month before.

A. C. Galt, for the appellant.

W. R. Meredith, Q.C., for the respondents.

MOLSON'S BANK *v.* HALTER.

Assignment for benefit of creditors—Mortgage to secure moneys used by trustee in breach of trust—Trust estate not a creditor—Intent to prefer—Having the effect of preferring—R. S. O., cap. 124, sec. 2.

The defendant W., who was executor under the will of one J., made in favour of himself and the defendant H., who was his co-executor under the will, a mortgage to secure the repayment of trust moneys improperly used by W., in breach of trust. W. was at the time this mortgage was given and continued to be in insolvent circumstances, but had made no assignment for the benefit of his creditors. The plaintiffs, execution creditors of W., attacked the mortgage.

Held, that no assignment having been made, an execution creditor might attack the security and take advantage of section 2 of the Act.

Held, also, that neither H., nor H. and W., as executors, were in the strict sense of the word creditors of W., and that the mortgage therefore could not be set aside as having been given with intent to prefer, or as having the effect of preferring, one creditor to another.

Held, also, OSLER, J. A., dissenting, that the words "or which has such effect" relate only to the immediately preceding clause, dealing with the preference of one creditor over others, and this mortgage not being a preference of one creditor over others, and not being made with intent to defeat, delay or prejudice creditors, could not be set aside.

Per BURTON, J. A.—These words apply only to a preference of one creditor over another, and even then only when there is an actual intent to prefer.

Per OSLER, J. A.—These words apply to the whole of the antecedent part of the section, embracing as well conveyances made with intent to defeat, delay, or prejudice as those made

with intent to prefer only; and any conveyance or transfer by an insolvent (with the exceptions specially mentioned in section 3) which has the effect of defeating, delaying, prejudicing, or preferring creditors, whatever may have been the intent with which it is made, is within the statute.

Judgment of MACMAHON, J., affirmed on other grounds.

W. H. Boulby for the appellants.

W. Nesbitt and *A. W. Aytoun-Finlay* for the respondents.

LINTON *v.* THE IMPERIAL HOTEL CO.

Landlord and tenant—Lease with proviso for determination in case of assignment for creditors—Right reserved to distrain after such assignment—Amount for which distress may be made. 50 *Vict., cap.* 23, *(O.)*

B., by lease dated 28th November, 1887, was lessee of certain premises at a yearly rental of $370, payable quarterly in advance, the lease containing a provision that if the lessee should make any assignment for the benefit of his creditors, the then current year's rent should immediately become due and payable, and might be distrained for, but that in other respects the term should immediately become forfeited and at an end. It was also agreed that the Act, 50 Vict., cap. 23, should not apply to the lease. B. paid $100 on account of rent on the 7th July, 1888, and on the 16th July, 1888, made an assignment to the plaintiff for the benefit of his creditors, and the plaintiff went into possession of the premises. On the 24th July, 1888, the defendants distrained, and were paid $270 by the plaintiff as assignee.

Held, that the lease did not become void, because of the assignment, but only voidable, that the right to claim the accelerated rent depended not upon the lessor's election to forfeit the term, but upon the fact of the lessee having made an assignment for the benefit of his creditors; that the clause was divisible and that the lessors might distrain for the rent as they had not elected to forfeit the term, the distress itself not being such an election to forfeit.

Judgment of the County Court of Wentworth varied.

W. Nesbitt and *W. M. Douglas* for the appellant.

E. Martin, Q.C., for the respondents.

BLACKLEY *v.* MCCABE.

Negotiable instrument—Cheque—Presentment—Accord and Satisfaction.

On the 26th June P. and M. exchanged cheques for the sum of $575, for the accommodation of P., the cheque of P. being drawn on a bank in Hamilton, and the cheque of M. being drawn on F. and L., private bankers in Toronto. It was agreed that the former cheque should not be presented before the 1st July, and it was alleged by P., but denied by M., that a similar restriction applied to the latter cheque. F. and L. suspended payment and closed their doors about noon on the 27th of June, having a large balance in their hands at the credit of M. His cheque was never presented for payment. M. on the 27th of June issued a writ against F. and L. to recover the balance in their hands, the amount of the cheque being included. The cheque of P. was presented and paid.

Held, assuming that there was no agreement to postpone presentment, P. had the whole of the 27th June to present M.'s cheque, and that although the suspension of the bankers would not in itself excuse non-presentment, yet this suspension and the bringing of the action by M., which operated as a countermand of payment, would; and that therefore M. became immediately liable to P. on his cheque.

Some time after the suspension of F. and L. and after some negotiations between P. and M. as to payment of M.'s cheque, P. signed a memorandum drawn up by M. in the following form: "Please take judgment when you think best against F. and L.—to include the amount of your cheque for $575 to me—upon the understanding that the same is to be paid me out of the first proceeds of such judgment. You are to exercise your best discretion in the matter."

M. then went on with his action and entered judgment, but nothing was recovered.

Held, that this memorandum did not necessarily import an abandonment of P.'s claim upon the cheque, and the acceptance of a new and substituted mode of obtaining payment,

and did not operate as an accord and satisfaction.

Decision of the Queen's Bench Division affirmed.

Robinson, Q.C., and *Bigelow* for the appellant.

Osler, Q.C., for the respondent.

IN THE MATTER OF ROBERTSON AND THE MUNICIPAL COUNCIL OF THE TOWNSHIP OF NORTH EASTHOPE.

Municipal corporations — Drainage by-law — Petitioners for—R.S.O., c. 194, ss. 292, 293, and 569.

A petition of landowners under 46 Vict. c. 18, s. 570 (R.S.O., c. 184, s. 569), for the construction of drainage works, must include a majority of all the persons found by the engineer to be benefited by the proposed works, and not merely a majority of the persons mentioned in the petition itself.

Unless the petition is signed by such majority the Council have no jurisdiction, and a by-law founded on a petition not signed by such majority is void, and cannot be upheld, even though valid on its face.

If the petition is not signed by such majority the opponents of the by-law are not restricted to the mode of objection given by ss. 292 and 293 of the Act of 1883 (R.S.O., c. 184, ss. 291 and 292), but are entitled to attack the validity of the by-law on this ground, by application to quash, even after an unsuccessful appeal to the Council.

Where a Council know that the majority have not signed, though no evidence to prove this fact is given by the opponents of the by-law, it is just as much their duty not to pass the by-law as if its insufficiency had been proved after the most elaborate investigation at the instance of persons opposed to it, and they have no right to impose upon the opponents of the by-law as a term for refusing to pass it, and any condition as to payment of expenses theretofore incurred.

The decision of STREET, J. (reported 15 O.R. 423) reversed.

Lash, Q.C., and *J. E Harding*, for the appellants.

Idington, Q.C. for the respondents.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Divisional Court.] [March 7.

LEWIS *v.* BRADY.

Assessment and taxes — Distress for taxes — Legal assessment—Delivery of roll to collector—Appointment of collector — Declaration of office—Demand of taxes—R.S.O., c. 193, ss. 12, 120, 132, 133.

The defendant, as collector of taxes of a village for the year 1886, on the 9th January, 1888, seized goods of the plaintiff as a distress for taxes assessed against the plaintiff upon the assessment roll for 1886. The plaintiff brought this action of replevin to recover the goods so seized.

(1) *Held*, upon the evidence, that it was not shewn that the plaintiff was not duly and legally assessed for the taxes in respect of which the distress was made.

(2) S. 120 of the Assessment Act, R.S.O., c. 193, provides that the clerk shall deliver the roll to the collector on or before the 1st day of October, or such other day as may be prescribed by a by-law of the local municipality; but no by-law was passed, and the roll for 1886 was not delivered by the clerk to the defendant until about the 1st of January, 1887.

Held, that the provisions of s. 120 were directory, and not imperative; and the omission to deliver the roll within the prescribed time had not the effect of preventing the collector from proceeding to collect the taxes mentioned in the roll as soon as it was delivered to him, or of rendering such proceedings invalid.

(3) S. 132 of the Act provides that every collector shall return his roll to the treasurer on or before 14th December in each year, or such day in the next year not later than 1st February, as the council may appoint; and s. 133 provides that in case the collector fails to collect the taxes by the day appointed, the council may by resolution authorize the collector or some other person in his stead to continue the levy and collection. On 12th December, 1886 (before

the roll was delivered to the collector), the council passed a resolution that the collector proceed at once to collect the taxes for 1886; on 7th March, 1887, another resolution instructing P Brady (the defendant) to enforce the payment of the uncollected taxes at once; on 14th November, 1887, a resolution that P. Brady, collector, be instructed to have the roll for 1886 returned by the 24th inst.; and on 17th January, 1888 (after the distress and before the replevy), a resolution that the time for the collection of the unpaid taxes for 1886 be extended until the 15th February, 1888, and that P. Brady be authorized to collect until that date. The roll for 1886 remained in the hands of the defendant from the time of the delivery of it to him until after the distress and replevy.

Held, that the defendant was either the collector within the meaning of s. 132 when he made the distress, and having the roll still in his hands unreturned was authorized to make it, following *Newberry* v *Stephens*, 16 U.C.R., 65; or he was a person authorized as collector, or in the stead of the collector, by the resolution of the council to continue the levy and collection under s. 133, which provides no limit of time in such case; and in either case the distress by him was valid.

(4) By the by-law providing for the assessment and levying of rates for 1885 passed by the council on 11th December, 1885, the defendant was appointed collector to collect the rates for 1885.

On the 23rd December, 1886, the defendant entered into a bond with sureties as collector to the corporation of the village, which recited that he had been appointed collector; and on the same day a resolution was passed by the council that the bonds of P. B. as collector be accepted, as presented to the council; but no other appointment of the defendant as collector was proved, and the defendant swore that he did not think he made any declaration of office for any year.

Held, that the effect of the defendant's not having made and subscribed the declaration required by s. 271 of the Municipal Act, R.S.O., c. 184, was not to make his acts void; and having been duly appointed by by-law collector, he held office until removed by the council, even if what was done by the council on the 23rd December, 1886, did not constitute a good apointment.

(5) *Held*, that the appointment in December, 1887, of another person to collect the rates for 1887 had not the effect of removing the defendant from office; for it was an appointment for that year only, and by s. 12 of the Assessment Act the council might appoint such number of collectors as they might think necessary; but even if it had that effect, the roll for 1886 had not been returned by the defendant, and the resolution of the 17th January, 1888, authorized him to continue the collection under s. 133, and legalized the distress then made.

(6) It was proved that the defendant on the 11th January, 1887, duly demanded the taxes distrained for.

Held, that this demand was sufficient to warrant the distress, and the fact that the defendant several times afterwards demanded the same taxes did not affect the validity of the first demand, which was the only one required.

R. M. Meredith, for the plaintiff.

S. H. Blake, Q.C., for the defendant.

Divisional Court.] [March 7.

LANG *v.* SLINGERLAND.

Bail—Discharge—Action on recognizance—Surrender of principal—Notice of surrender—Exoneretur—Bail relieved on terms—Amount of recovery against bail—Rules 1062, 1064, 1085.

The defendants were special bail for one S., upon a recognizance in an action by plaintiff against S.

The proceedings in the original action were begun and carried on in the County of Middlesex, and the condition of the recognizance was that S. would, if condemned, satisfy, etc., or render himself to the custody of the sheriff of Middlesex, or the cognizers, the present defendants, would do so for him. The defendants on the 7th February 1888, rendered S. to the sheriff of Norfolk, S. being found in that county, and obtained from the sheriff a certificate of such render, but obtained no order for the entry of an exoneretur. The writ of summons in this action upon the recognizance was served on the defendants on the 10th of April, 1888, and on the 16th of April, 1888, the defendants served on the plaintiff a notice of the render of S. to the sheriff of Norfolk.

R.S.O., 1877, c. 50, s. 40 (now Rule 1062), provides for the render of the defendant to the sheriff of the county in which the action against such defendant has been brought ; and s. 42 of the same Act (now Rule 1064) provides that special bail may surrender their principal to the sheriff of the county in which the principal is resident or found, and that, upon proof of due notice to the plaintiff of the surrender, and production of the sheriff's certificate thereof, a Judge shall order an exoneretur to be entered on the bail-piece, and thereupon the bail shall be discharged,

Held, that the bail were not entitled to be discharged, and that the plaintiff was entitled to bring this action upon the recognizance, because no exoneretur had been entered upon it, notwithstanding the notice of render ; but that, the substantial duty of rendering the principal having been performed, the defendants should be relieved upon terms.

The Court ordered that upon the defendants filling an order for an exoneretur within two weeks, and paying the cost of the action within ten days after taxation, the judgment for the plaintiff should be set aside and all other proceedings stayed ; otherwise judgment to be entered for the plaintiff with costs.

Held, also, that under Rule 89 of T.T., 1856, (now Rule 1085) the liability of bail is limited to the amount of their recognizance ; and the plaintiff having recovered in the original action the whole sum sworn to in the affidavit of debt, his recovery against the bail should not in any event be more than that sum.

Gibbons, for the plaintiff.

Watson, for the defendants.

PEARSON *v.* MULHOLLAND.

Title to land—Description—False demonstration—Exception void for uncertainty—Operation of release—"Remise, release and quit claim"—Operation of as grant or bargain and sale—14 & 15 *Vict., c.* 7, *s.* 2—*Possessory title.*

L. in conveying land to S. described it as being composed of the southerly half of Lot 17, in the 4th concession of King, giving it the metes and bounds of the east half. The only part of Lot 17 which L. had was that conveyed to him by B. as a part of Lot 17, giving it the metes and bounds of the east half the same as in the deed to S. ; and the same quantity was conveyed in both deeds.

Held, that the metes and bounds given in the deed to S. correctly described the lands intended to be conveyed, and the words "southerly half" were controlled by them.

A sheriff's deed of lands sold at a tax sale described them as "forty-five acres of the south half of Lot 17 in the 4th concession" of King ; and the deed to S. before mentioned contained an exception "save and excepting out of the same forty-five acres sold for taxes."

Held, that the exception was void for uncertainty ; and a subsequent release of lands purchased at the tax sale by the sheriff's vendee to S. had sufficient to operate upon and was effectual as a release.

By indenture of Bargain and Sale made in 1856 between L. and K., in consideration of $4,000 (the receipt whereof was thereby acknowledged), did remise, release and quit claim unto K., his heirs and assigns, the south half, &c., to have and to hold, &c.

Held, that since 14 & 15 *Vict., c.* 7, *s.* 2, the words "remise, release, and quit claim" may operate as a grant ; and either before or since that enactment they would operate as a bargain and sale.

Acre v. Livingstone, 24 U.C.R. 282, not followed.

Held, also, upon the evidence, that the defendant had no such possession of the land in question as would extinguish the title of the true owner.

E. D. Armour, for plaintiff.

Merritt, for defendant.

Chancery Division.

ROBERTSON, J.] [January 9.

NICHOL *et al v.* ALLENBY.

Injunction—Right to maintain action—Owner of undivided share in land—Purchaser at sale under void partition proceedings—Simple contract creditors—Mortgage of undivided share—Power of Local Master—Lands in two counties.

In an action for an injunction brought by (1) the owner of two undivided third parts of cer-

tain lands, (2) the purchaser at a sale of the lands under an order made by a Local Master for the partition or sale of lands in two different counties, and (3) a simple contract creditor of the owner of the other undivided third part of the lands, against a mortgagee of the latter's undivided third to restrain the mortgagee from proceeding with a foreclosure action. It was *Held*, that if the lands sought to be affected by the order for partition or sale of the local master lie in more than one county, the jurisdiction of the local master does not attach, and, following *Queen* v. *Smith*, 7 P.R. 429, the master having no jurisdiction to make the order for partition or sale, all proceedings under it were null and void.

Held, also, that the owner of the two undivided third shares of the land had no right to redeem the mortgage of the other undivided third share.

Held, also, that a simple contract creditor had no right to redeem.

Query. Whether a mortgagee of an undivided share in the lands should not be made a party to partition proceedings?

John Hoskin, Q.C., and *W. Nesbitt*, for plaintiffs.

Bain, Q.C., for the defendant.

BOYD, C.] [March 27.

HALL *v.* FORTYE.

Assignment for creditors—Consent of creditors—Ratification subsequent.

Under R.S.O., c. 124. Although an assignment may not have been made in the first instance with the assent of creditors, yet if the creditors subsequently ratify and consent to it, it becomes as valid and effectual as though the assent was prior to or concurrent with the assignment.

Hoyles, for plaintiff.

Shepley, for defendant.

Practice.

FERGUSON, J.] [April 23.

UNION BANK *v.* STARRS.

Evidence—Depositions in examination for discovery before statement of defence—Office of company—Rule 506.

Before delivery of his statement of defence, one of the defendants obtained an order to examine an officer of the plaintiffs for discovery, and examined him thereunder.

Held, that such defendant could under Rule 506 read the depositions so taken as evidence at the trial of the action.

W. R. Meredith, Q.C., for the plaintiffs.

Aylesworth, for the defendant O'Gara.

MACLENNAN, J. A.] [April 25.

ROLANDS *v.* CANADA SOUTHERN R.W. CO.

Appeal—To Supreme Court of Canada—Judgment of Court of Appeal upon appeal from Divisional Court refusing new trial—Notice of appeal—R.S.C., c. 135, ss., 24 (d.), 41—Extension of time—Circumstances of case.

The defendants appealed to the Court of Appeal from an order of a Divisional Court discharging an order *nisi* to enter judgment for the defendants or for a new trial, on the ground, among others, that the trial judge should have withdrawn the case from the jury or should have directed them otherwise than he did. The Court of Appeal dismissed the defendants' appeal, and the defendants sought to appeal from such dismissal to the Supreme Court of Canada.

Held, that the judgment of the Court of Appeal, came within s. 24 (d) of the Supreme and Exchequer Courts' Act, R.S.C., c. 135, as "a judgment upon a motion for a new trial upon the ground that the Judge had not ruled according to law"; and that the proposed appeal was governed by the necessity for the notice of appeal within twenty days prescribed by s. 41 of the Act. The judgment of the Court of Appeal was delivered on the 5th of March, 1889. On the 16th March the solicitors for the defendants wrote to their clients suggesting an appeal, but they received no instructions until the 2nd April, and took no step till the 3rd April. No explanation was offered of the delay or neglect except the production of a telegram to the solicitors from an officer of the defendants', giving instructions to appeal, and suggesting that the matter had been overlooked by another officer.

The Judges in the Divisional Court and Court of Appeal were unanimous in deciding against the defendants.

Held, that under these circumstances the time for giving the required notice should not be extended.

Gordon v. *Great Western R.W. Co.*, 6 P.R. 300; *Sievewright* v. *Lews*, 9 P.R. 201; *Lewis* v. *Talbot Street Gravel Road Co.*, 10 P.R. 15; *Langdon* v. *Robertson*, 12. P.R. 139, referred to.

R. M. Meredith, for the plaintiff.

D. W. Saunders, for the defendants.

Court of Appeal] [April 30.

COLE *v.* HALL.

Mechanics' liens—Parties—Priorities—Subsequent incumbrancers—Master's office—R.S.O. c. 116, ss. 25, 29.

The appellant's execution against lands was placed in the sheriff's hands shortly after the registration of a mechanic's lien by the plaintiff, who began his action to enforce such lien, and registered his *lis pendens* within the ninety days prescribed by s. 23 of the Mechanics' Lien Act, R.S.O., c. 126, but did not cause the appellant to be added as a party till the case had got into the Master's office, which was after the expiry of the ninety days.

The appellant contended that, as against him proceedings to realize the plaintiff's lien had not been instituted within the proper time, and therefore his execution had gained priority over the lien, and he was improperly added as a subsequent incumbrancer in the Master's office. S. 29 of the Act provides that the lien may be realized in the High Court according to the ordinary procedure of that Court.

Held, that the effect of ss. 23 and 29 is that the lien shall cease after ninety days unless in the meantime proceedings are instituted in the High Court, according to its ordinary procedure, to realize the claim; the practice or procedure of the Court is as much the law of the land as any other part of the law; and the making the appellant a party to the proceedings in the Master's office was a regular step in the action, authorized and prescribed by the practice and procedure of the Court for nearly forty years, of which the appellant could not complain, the action having been regularly commenced within the ninety days.

White v. *Beasley*, 2 Gr. 666; *Moffatt* v. *March*, 3 Gr. 163; and *Jackson* v. *Hammond*, 8 P.R. 157, referred to.

Juson v. *Gardiner*, 11 Gr. 23; *Shaw* v. *Cunningham*, 12 Gr. 101; *McDonald* v. *Wright*, 14 Gr. 284; and *Bank of Montreal* v. *Haffner*, 10 A.R. 597, distinguished.

Decision of FERGUSON, J., 12 P.R. 584, affirmed.

C. Millar, for the appellant.

Hoyles, for the respondent.

STREET, J.] [May 1.

REGINA *ex rel* WHYTE *v.* MCCLAY.

Municipal elections—Quo warranto proceeding—Reference to take evidence—Jurisdiction of County Judge—Jurisdiction of Master in Chambers to refer—R.S.O., c. 184, s. 212—Rule 30.

Section 212 of the Municipal Act, R.S.O., c. 184, has not been affected by the Consolidated Rules, and under it a reference may be directed to a County Court Judge to take evidence where in a *quo warranto* application, a violation of s. 209 or 210, is charged; and, as by Rule 30 the Master in Chambers has in *quo warranto* matters the jurisdiction of a Judge of the High Court, he has power to direct a reference under s. 212 to a County Court Judge.

Aylesworth, for the relater.

W. R. Meredith, Q.C., for the respondent.

MR. DALTON.] May 2.

ASHLEY *v.* BRENTON.

Discovery—Examination of plaintiff by defendant after interlocutory judgment—Rule 488.

After the plaintiff had signed interlocutory judgment against the defendant in an action of tort, the defendant sought to examine the plaintiff for discovery, the action being about to come on at the assizes for assessment of damages.

Rule 488 shews that the examination of a plaintiff by a defendant may take place at any time after such defendant has delivered his statement of defence.

Held, that the defendant could not examine the plaintiff.

D. Armour, for plaintiff.

C. J. Holman, for defendant.

BOYD, C.] [May 7

MCKAY *v.* MAGEE.

Costs—Scale of—Action to set aside the conveyance as fradulent—Judgment under $200—Other claims against judgment debtor—Creditors' Relief Act.

In an action by a judgment creditor seeking payment out of land alleged to have been conveyed away by the debtor in fraud of the plain-

tiff, the proceedings were not alleged to be taken on behalf of other creditors, and the plaintiff's judgment was less than $200. It appeared that there were three other claims, amounting in all to $36, owing by the judgment debtor. Before the trial of the action a settlement of the plaintiff's claim was effected for $75 and costs, and upon the taxation of these costs a question arose as to the scale.

Held, that the case was taken out of the provisions of the Creditors' Relief Act by the compromise between the plaintiff and defendant; and the plaintiff's claim being less than $200, the costs should be on the lower scale.

Forrest v. *Laycock*, 18 Gr. p. 622, followed.

Dominion Bank v. *Hefferman*, 11 P.R. 504, distinguished.

J. B. Clarke, for the plaintiff.

Middleton, for the defendant.

BOYD, C.] [May 7.

In re SOLICITORS.

Courts—Divisions of High Courts—Solicitor and client taxation—Proper officer to tax—R.S.O. c. 147, *s.* 32.

R.S.O., c. 147, s. 32, provides that a bill of costs may be referred for taxation to "the proper officer of any of the Courts in the county in which any of the business charged for was done."

Held, that "Courts" here does not mean "Divisions of the High Court;" and where the business charged for was done in the office of the local Registrar and Master at Belleville, the reference for taxation was properly made to the Deputy Clerk of the Crown at Belleville, both being officers of the same Court.

Hoyles, for the solicitors.

A. H. Marsh, for the clients.

BOYD, C.] [May 9.

In re HARDING.

Infants—Sale of land—Consent—Majority o infants—R.S.O., c. 137, *s.* 4.

Nothwithstanding the provision of R.S.O. c. 137, s. 4, that an application for the sale of an infant's lands shall not be made without the consent of the infant, if he is of the age of fourteen years, the consent of a majority of infant land-owners may be sufficient; for by the Interpretation Act, R.S.O., c. 1, s. 8, ss. 24 and 34, words importing the singular number shall include more persons, and females as well as males, and where an act or thing is required to be done by more than two persons, a majority of them may do it.

And in this case, where they were three infants all over fourteen, and two of them consented to a sale of their lands, but the eldest had disappeared and could not be reached, an order was made dispensing with the consent of the one, the sale being evidently for the benefit of all the family.

H. E. Ridley, for the motion.

J. Hoskin, Q.C., for the infants.

Appointments to Office.

CORONER.

Waterloo.

J. H. Radford, M.D., of Galt, to be an Associate Coroner for the County of Waterloo.

POLICE MAGISTRATE.

North Riding of Essex.

Alex. Bartlett, of Windsor, to be Police Magistrate without salary for the North Riding of Essex, except the Township of Anderdon.

BAILIFF.

Parry Sound.

Jas. Coff, of Byng Inlet, to be a Bailiff of the First Division Court of the District of Parry Sound.

Frontenac.

Saml. Mitchell, of Plevna, to be Bailiff of the Sixth Division Court of the County of Frontenac.

Manitoulin.

J. C. Nelles, of Gore Bay, to be Bailiff of the Fourth Division Court of the District of Manitoulin, *vice* E. H. Jackson, resigned.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with clause four of this Curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be), on conforming with clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher and pay $1 fee; and on or before the first day of presentation or examination file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hiliary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday of June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term, at 9 a.m. Oral on the Wednesday, at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term, at 9 a.m. Oral on the Friday, at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term, at 9 a.m. Oral on the Thursday, at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term, at 9 a.m. Oral on the Thursday, at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after admission on the books of the society as student or articled clerk.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the

First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term. Candidates for Certificates of Fitness are not required to give such notice.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

24. All notices may be extended once, if request is received prior to day of examination.

25. Printed questions put to Candidates at previous examinations are not issued.

FEES.

Notice Fee	$ 1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM for 1889 and 1890.

Students-at-Law.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil Æneid, B. 1 V.
- Cæsar, B. G. b, I.) 33.)

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic : Algebra, to the end of Quadratic Equations : Euclid, Bb. I. II. and III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical reading of a selected Poem :

1889—Scott, Lay of the Last Minstrel.

1890—Byron, The Prisoner of Chillon ; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the

Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek :—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1889—Lamartine, Christophe Colomb.
1890—Souvestre, Un Philosophe sous le toits.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography ; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1889, 1890, the same portions of Cicero, *or* Vigril, at the option of the candidate, as noted above for Students-at-law.
Arithmetic.
Euclid Bb. I. II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of clerkship mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition ; Manual of Common Law ; Smith's Manual of Equity ; Anson on Contracts ; the Act respecting the Court of Chancery ; the Canadian Statutes relating to Bills of Exchange and Promissory Notes ; and Cap. 123 Revised Statutes of Ontario, 1887, and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition ; Greenwood on Conveyancing, chaps, on Agreements, Sales, Purchases, Leases, Mortgages, and Wills ; Snell's Equity ; Broom's Common Law ; Williams on Personal Property ; O'Sullivan's Manual of Government in Canada, 2nd edition ; the Ontario Judicature Act ; R.S.O., 1887, cap. 44, the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110 143.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles ; Taylor's Equity Jurisprudence ; Hawkins on Wills ; Smith's Mercantile Law ; Benjamin on Sales ; Smith on Contracts ; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons ; Pollock on Contracts ; Story's Equity Jurisprudence ; Theobald on Wills ; Harris's Principles of Criminal Law ; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers : Best on Evidence ; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Michaelmas Term, 1888.

BISHOP RIDLEY COLLEGE
OF ONTARIO, LIMITED.
ST. CATHARINES.

A Protestant Church School for Boys, in connection with the Church of England, will be opened in the property well-known as "Springbank," St. Catharines, Ont., in September next, 1889.

Boys prepared for matriculation, with honors in all departments, in any University ; for entrance into the Royal Military College ; for entrance into the Learned Professions. There will be a special Commercial Department. Special attention paid to Physical Culture. Terms moderate. For particulars apply to the Secretary, 26 King St. E., Toronto.

FRED. J. STEWART, *Sec.-Treas.*

The Canada Law Journal.

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THE TORRENS SYSTEM.

THE annual report of the Master of Titles reveals a steady amount of progress in the development of the Torrens System of registration of titles. During the past year, although only thirty-five applications were made for first registration, yet the aggregate value of the property covered by these applications was $654,120. The total number of instruments registered to the end of 1888 was 4,105; of these, 3 were registered in 1885; 645 in 1886; 1,196 in 1887; and 2,261 in 1888. The fees of the office last year amounted to $5,855.70, which was nearly $600 more than the expenses of the office. The Master of Titles is able to report that the great majority of the legal profession and of dealers in real estate, now that they have become acquainted with the routine of the system, are heartily in accord with it. In the districts to which the Torrens System has been extended we see there have been already 518 titles registered. The Assurance Fund amounts now to $7,467.40, and so far there have been no drafts upon it. On looking through the schedule containing the list of applications during the past year, the fees paid to the office on first registration do not appear to have been very heavy; the heaviest amount being only $108.85 for the registering of the title to a property valued at $28,875. On the other hand, for a property valued at $50,000 only $39.50 was paid. The average of the office fees paid for first registration amount, we find, to not quite 16 mills on the dollar of the value of the property registered. Of course to this must be added the solicitor's fees, and the payment to the Assurance Fund, but even with these additions—considering the great benefits conferred by the registration—we do not think the expense can be said to be very heavy.

We are somewhat surprised to find that, notwithstanding the experience which has thus far been gained in Toronto of the merits of the system, no attempt appears to have been made to extend its operation to other counties in Ontario. The facility it affords for the rapid transfer of property when cut up into small lots, has no doubt led to its adoption in Toronto to a considerable extent, but security of title and facility for rapid transfer, are boons which the system offers to all owners of land, whether their holdings are large or small, and these are boons which we should think most land owners would like to secure even at some little sacrifice.

THE FOLLIES OF LITIGATION.

In the recent case of *Conway* v. *Fenton*, 40 Ch. D. 518, Kekewich, J., observed, "I know of nothing which requires more careful exercise of judicial power than the deciding on, or granting applications when there is no real argument; the consent business of the Court being, according to my experience, more difficult than the contentious business." This o[illegible] shared in by all the members of the Bench, but we think, it is none the less true. In contentious cases the Court has [illegible] ance of the Bar, all the facts are presented, and the authorities bearing on the case are usually brought to the notice of the Court. On the other hand in consent motions, or *ex parte* applications, the Court usually gets very little assistance from the Bar, as the only parties represented are those who are interested in getting the Court to make the order asked.

[illegible] equity jurisprudence ; Smith's Mercantile [illegible] ; Smith on Contracts ; [illegible] eading and Practice of

Point is given to Mr. Justice Kekewich's remarks by a matter which was lately before the English Court of Appeal. The matter in question was an application to strike a solicitor off the rolls for improper conduct, and though the Court of Appeal reversed the order striking the solicitor off the rolls, they, nevertheless, felt constrained to make some strong observations on the scandalous state of affairs which the facts of the case disclosed.

It appeared that a man named William Coppin, who had acquired a possessory title to a house, died, leaving a will whereby he devised the house to his widow for her life, with remainder to his six children. The widow died, leaving a will whereby she (although having only a life estate) purported to devise the house in fee to a daughter who lived with her, and under this will the daughter claimed to be solely entitled; her eldest brother also claimed the property as heir-at-law. The brothers and sisters quarrelled bitterly amongst themselves. The mother's devisee then went to the solicitor in question, and the opinion of counsel was taken, who advised that the property was divisible between all the brothers and sisters under their father's will, and he advised that they should all consent to a sale and a division of the proceeds amongst them; and if this could not be done, then that it would be necessary to apply in the County Court for a partition. The daughter, who claimed as devisee of her mother, refused to get the consent of the other parties to a sale, and instructed the solicitor to go on with a partition suit. This suit was accordingly brought, and resulted in a sale of the property for £360; and the solicitor concluded the proceedings by sending a bill for his costs of the suit, amounting to £400! and it was in consequence of this outrageous disproportion between the costs and the fruits of the litigation, that the application was made against the solicitor.

The Queen's Bench Divisional Court considered the solicitor had been guilty of misconduct, and struck him of the rolls; but on appeal the Court of Appeal reversed the order. On referring to the proceedings in the County Court suit, it appeared that although the property was producing only 10 shillings a week, yet the County Court judge had, on an *ex parte* application, granted an order for a receiver; and that in pronouncing the judgment for partition he had included in

it a number of absurd and useless inquiries, which were proposed by the plaintiff's solicitor, and not objected to by the defendant's solicitor; *e.g.*, an inquiry was ordered whether William Coppin (the father) had any and what children, and if so when they were born and whether they were living at the time of his decease, (all of the children being actually parties to the suit). "Whether Edwin Smith is alive, and whether he was living at the time of the decease," (Edwin [illegible] of the plaintiff's solicitor). "Whether Mr. Coppin was [illegible] eal estate," etc., all of which inquiries were perfectly use-

[illegible] ng before the judge on which he could have at once declared that the plaintiffs and defendants were entitled to the property in equal shares. We may mention that the judgment was drawn up with a blind adherence to some book of forms, without any regard to the real requirements of the case and under the supposition that it was the *usual form* in all partition suits.

The Court of Appeal relieved the solicitor from the imputation of having acted dishonestly, but at the same time came to the conclusion that neither he, nor the judge of the County Court, nor the defendant's solicitors, could have known anything about the proper mode of proceeding in such cases—which goes to show the truth of the proposition of Kekewich, J., with which we started.

Some judges seem to assume that because a motion is consented to, that that relieves them from any responsibility of seeing to the propriety of the order they are called on to make, but we think this is a mistaken view. The case we have referred to, shows that solicitors may sometimes, through ignorance of the proper practice, consent to proceedings which are very far from being in the true interests of their clients; and it is not too much to expect that judges shall not sanction, as a matter of course, proceedings which may prove a perversion and mockery of justice. Can a judge be said to have done his duty when he has, without proper consideration, sanctioned needless proceedings leading to the eating up of the whole subject of litigation in costs? We think not.

The procedure of the law for the enforcement of the rights of litigants, is, in the main, well adapted to its purpose; but in unskilful and ignorant hands it is capable of becoming an instrument of destruction. It is like placing a loaded gun in the hands of a child, and it is quite possible to work much ruin from the sheer ignorance and incompetence of the practitioner, without any admixture of fraud on his part. The case we have referred to, may seem an extraordinary and unparalleled instance of the folly with which litigation is sometimes carried on, but it so happens that in this Province an almost identical case has just come to light, in which a squabble over a dead man's estate has resulted in the estate selling for about $1,100, and the costs of the various solicitors for litigation to settle the rights of the parties has amounted to over $1,400. The facts of this case, we understand, were somewhat as follows: B. being the owner of the lot in question, died; a woman who had lived with him as his wife, and by whom he had had four children, survived him, together with the children. This woman after B.'s death married C., and she and C., with one of the children of B., continued to live on the place. It seems to have occurred to C. that if his wife would deny her marriage with B. he might claim the property as his own by possession.

So proceedings were commenced by C. to quiet his title. During the proceedings he died, and the proceedings were subsequently continued by his representatives. The child of B. then appeared as a contestant, and after fighting out the question whether there had been any marriage between B. and the widow of C., it was ultimately agreed that there should be a compromise on the basis that the land should be sold, and the proceeds divided in certain proportions "after payment of the costs of all parties." Here again the solicitors of all parties consented to, and the Court sanctioned, the compromise; but it very soon appeared when the costs came to be taxed, that the lawyers in consenting to this arrangement were merely consenting to divide the proceeds of the litigation between themselves, and still leave a large balance of costs, to be made good by their unfortunate clients. And the question naturally arises, Would the Court have sanctioned a compromise on the consent of solicitors which handed over to them the whole fruits of the litigation, if the whole facts had been placed before them?

It is possible that in this case as in the other which has been referred to, a certain amount of retributive justice has been done. In the first case the land in question had been virtually stolen from its rightful owner by the testator, and in the latter case it would appear as if the litigation was set on foot with a view to depriving the rightful heirs of the deceased of their property. Certain it is that where a woman comes forward to bastardise her own issue, as the basis of proceeding to deprive them of property, to which, if legitimate, they would be entitled, even though her claim be well founded, it can hardly hope to escape being regarded with the greatest suspicion; but even though this retributive aspect of the case may lead one to entertain somewhat less sympathy for some of the litigants than would otherwise be the case, it, nevertheless, can hardly be denied that it is mockery of justice that such a result can in any case be arrived at under the forms of law with impunity.

RECENT LEGISLATION.

THE law relating to Bills of Lading received an important amendment at the recent session of the Dominion Legislature. By 52 Vict., c. 30, which recites that by the custom of merchants a bill of lading is transferable by indorsement, whereby the property in the goods passes to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading remain in the original shipper; and also that it frequently happens that the goods, in respect of which bills of lading are signed, have not been laden on board: it is enacted that the consignee and every indorsee of the bill of lading to whom the property in the goods passes shall have vested in him all such rights of action, and be subject to all such liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself, without prejudice to the right of stoppage *in transitu*, or any right of an unpaid vendor under the civil code of Lower Canada, or any right or claim for freight against the original shipper or owner, or any liability of the consignee or indorsee. The bill of lading in the

hands of a consignee or indorsee for value, is made conclusive evidence of the shipment of the goods, as against the person signing the same. But the person signing may exonerate himself from liability by showing that the misrepresentation was caused without any default on his part, and wholly by the fault of the shipper or holder, or of some person under whom the holder claims.

The Dominion Winding Up Act has been amended in some important particulars by 52 Vict., c. 32 (D). Chief among these amendments is the power conferred on the Court to make a winding up order at the instance of the company or a shareholder, when the period fixed by the charter for the duration of the company has expired, or when an event has occurred, on the lapsing of which by the charter the company is to be dissolved; also where the company at a special meeting of the shareholders passes a resolution requiring the company to be wound up; or where the company is insolvent within the meaning of the Winding Up Act; and also at the instance of a shareholder for at least $500, where 25% of the stock has been lost and it is shown that the lost capital will not likely be restored within a year; or when he can show to the Court that it is just and equitable that the company should be wound up. Provision is made enabling the Court to adjourn the proceedings, and appoint an accountant to inquire into the affairs of the company, when the company opposes of the application. The Court is empowered to dispense with the notice to creditors, contributors, shareholders, or members of the company required by the Winding Up Act; and the liquidator may be authorized to exercise any of the powers conferred on him by the Act without the sanction or intervention of the Court; and the Court may limit and restrict the powers of interim liquidators. Liquidators are empowered to require creditors to attend and prove their claims when they consider they should not be allowed without proof. Certain verbal amendments are made to the principal Act, and the Court is to have "the same power and jurisdiction to cause or allow service of proceedings under the Act on persons out of the jurisdiction. as in ordinary suits within the ordinary jurisdiction of the Court." It remains to be seen how far this provision will be of any effect. According to some recent English decisions it would seem that the Court has in ordinary cases no inherent jurisdiction to authorize service of its process on persons beyond the jurisdiction, and that its power to do so is strictly governed by statute. The Act is also amended so as to enable the Court to refer matters to its officers under the Winding Up Act as in an ordinary suit, subject to an appeal, according to the ordinary practice of the Court; and proceedings under a winding up order are to be carried on as nearly as may be in the same manner as any ordinary action within the jurisdiction of the Court.

By chap. 36 further provision is made for the extradition of criminals. The list of crimes includes amongst other offences, larceny, embezzlement, obtaining goods under false pretences, so that many persons who have committed such crimes in foreign countries will find Canada no longer a safe harbour of refuge.

The Supreme Court Act has been amended by chap. 37; among other things, by preventing a judge whose decision is appealed from, or who took part in the trial of the cause or matter, from sitting as a judge on the hearing of the appeal.

The object of this section, we presume, is to prevent a judge of an inferior Court who is appointed judge of the Supreme Court from taking any part in appeals in any action in which he has taken any judicial part whilst a member of the inferior Court. Two additional cases have been added to the list of cases in which appeals may be had to the Supreme Court: 1st, from judgments of the Court of last resort in reference to the assessment of property for provincial or municipal purposes, where the judgment appealed from involves the assessment of property at a value of not less than $10,000; 2nd, from judgments of any Court of Probate where the matter in controversy exceeds $500. Provision is also made for entering a suggestion on the death of a sole plaintiff or defendant, pending an appeal, in order to enable the appeal to be prosecuted by or against the representatives of the deceased.

The Exchequer Court is, by chap. 38, empowered to direct references, to take accounts, etc., and to make rules; and the Finance Minister is authorized to pay interest on judgments recovered in the Exchequer Court at the rate of four per cent. It does not say "per annum," but we presume that is what is meant.

By chap. 40 the Superior Courts are authorized to make rules for regulating the procedure and practice in criminal proceedings.

Chap. 41 embodies the legislative effort of the session to punish trade combinations in undue restraint of trade; how far it will be successful is extremely problematical.

We are glad to see that bribery, corruption, intimidation and deceit of members or officers of municipal councils have, by chap. 42, been made indictable offences.

A wise and, we think, an exceedingly beneficial amendment has been made by chap. 44 in the criminal law, by enabling judges to release prisoners convicted of a first offence punishable with not more than two years' imprisonment, on their finding sureties for their good behaviour, and to appear when called on to receive judgment. The reclamation of offenders should, we think, be a distinct object of all penal legislation, and not merely the visitation of punishment; and it is much to be doubted whether in the case of first offenders, the confinement in gaol, instead of producing a wholesome effect, has not too often the effect of destroying the prisoner's self-respect, and rendering him a permanent member of the criminal class. The power of release, however, is one that will have to be very carefully and judiciously exercised.

The last session of the Ontario Legislature was not remarkable for any original legislative enactments, but several statutes came in for the annual process of amendment. We observe by chap. 10 that the Thellusson Act is declared "to have been and to be in force in Ontario." The Act was passed in 1800; whether the Act is to be deemed to have been in force from that date or any other is not very clear. The Act is not to affect any action or proceeding heretofore brought or now pending. See *Harrison* v. *Spencer*, 15 O.R. 692.

By chap. 11, local judges of the High Court are empowered to grant interlocutory injunctions for a period of 8 days in actions in the High Court, when it is proved to the satisfaction of the local judge that the delay required for an

application to the High Court is likely to involve a failure of justice. We are not aware that in the 38 years which have elapsed since the reorganization of the Court of Chancery that any public inconvenience has been felt, sufficient to warrant this enactment; it is, however, in accordance with the policy of decentralisation which appears to be in favor just now. By the same statute sheriffs are empowered to sell debts due to an absconding debtor, and the purchaser thereof is empowered to sue for their recovery in his own name.

By chap. 12 several amendments are made to the Division Courts Act. Among other things bailiffs are authorized to recover fees on executions, when the action is settled after seizure and before sale, and such fees are to form a lien on the goods. Among other amendments made, is one, whereby the County Attorney becomes *ex officio* Division Court Clerk, in the event of a vacancy in the office, until a successor is appointed. We also see that by sec. 24, after a transcript has been issued under section 217 of the principal Act, no further proceedings are to be taken in the Court from which the transcript issued, without the order of the judge, unless the creditor files an affidavit that the judgment remains unsatisfied, and that the execution issued in the division to which the transcript issued, has been returned *nulla bona*, and that deponent believes the defendant has not sufficient goods in that division to satisfy the judgment.

By chap. 13 some sensible provisions have been made in reference to arbitration. This Act, however, does not take effect until the 1st of July next, and is not to apply to any award or certificate made before that day. Under this Act the old formality of taking out an order, making a submission an order of Court, is done away with, and the filing of the award a certificate of the arbitrator, in cases where an appeal does not lie under R.S.O. c. 53, is to have the same effect as making the submission a rule or order of Court, and every agreement or submission which may under R.S.O., c. 53, s. 13 be made a rule of the High Court is for the purpose of any application to enforce or set aside the award, to be deemed to be a rule of Court without even filing it, or drawing up or issuing any order for the purpose. The time for moving against an award as to which an appeal does not lie under R.S.O., c. 53, is to be within 14 days after the filing of the certificate or award and the giving of notice of its filing to the opposite party; and an application to set aside an award as to which an appeal does lie cannot be made after the expiration of three months from its making and publication.

The law of libel and slander is amended by chap. 14, by rendering it unnecessary in an action for defamatory words spoken of any woman, imputing to her adultery, fornication, or concubinage, to allege or prove any special damage, but the plaintiff may recover nominal damages without proving any special damage. Where, however, the benefit of this Act is relied on, the statement of claim must allege that the action is brought under its provisions; and in such an action, if the plaintiff is not possessed of means to answer costs, the defendant may apply for security for costs.

By chap. 18, R.S.O., c. 110, s. 30 is amended so as to enable trustees, unless forbidden, to invest trust funds in debenture stock of companies mentioned in that section.

By chap. 19 sundry amendments are made to the Registry Act; amongst the rest, is one requiring that where a will is registered by production of the original will, there must be an affidavit proving the death of the testator. Cases have occurred, where wills have been registered before the death of the testator, and the devisees named therein have attempted to make title thereunder without waiting for the testator's death. Provision is made for a division of the Toronto City Registry office. It is a pity that no other means can be found for rewarding political supporters.

The Act respecting assignments and prefences by insolvent persons (R.S.O., c. 124) is amended by chap. 21, so as to prevent assignments being made to others than *bona fide* residents of this province, and also to prevent the removal of the assets out of the jurisdiction.

By chap. 23 numerous amendments are made to the Workmen's Compensation for Injuries Act (R.S.O., c. 141). The definition of superintendence is now to cover such general superintendence as a foreman, or a person in the position of a foreman, exercises, whether he is, or is not, ordinarily engaged in manual labour. This amendment is made to obviate the effect of the decision in *Kellard* v. *Rooke*. 21 Q.B.D.,367 (see ante vol. 24, p. 520). "Employer" now includes a body of persons corporate or incorporate, and the legal personal representatives of a deceased employer. "Railway servant" includes a tramway servant and street railway servant. This latter amendment is made, apparently, in consequence of the decision in *Cook* v. *North Metropolitan Tramways*, 57 L.T.N.S., 476, but it may be remarked that the English Act does not contain the words "any railway servant" in the section corresponding to R.S.O., c. 142, s. 2, s.s. 3, which defines the meaning of "workman." Section 7 seems to be designed to get over the effect of the decision in *Thomas* v. *Quartermaine*, 18 Q.B.D., 685, by providing that a workman continuing in an employment with knowledge of the defect, etc., which causes the injury, is not to be deemed to have voluntarily incurred the risk. The compensation recoverable is not to exceed $1,500 (see section 10.) The principal Act requires one month's notice of action, and an amendment has been made enabling the Court, when the objection of want of notice is raised, to adjourn the trial and enable a notice to be given on such terms as may be thought best. Section 14 enables the Court to distribute the compensation recovered between wife, husband, parent and child of the deceased; and section 15 gives a right of action under the Act against the personal representative of a deceased employer, but the Act is not explicit on this point.

Some important changes have been made by chap. 32 in the law of life insurance, by rendering nugatory conditions, stipulations, etc., impairing or modifying the effect of any contract of life insurance unless they are set out in full on the face or the back of the instrument. And no policy hereafter granted is to be avoided by any untrue statement in the application therefor unless it be material to the contract. Provision is also made by section 6, regarding representations as to age, which are not to avoid the policy though untrue, if made *bona fide*, but in case of a mis-statement as to age, the insured is only to be entitled to recover what would be due if the policy had been issued on the basis of his actual age at the time of effecting the insurance.

COMMENTS ON CURRENT ENGLISH DECISIONS.

THE Law Reports for May comprise 22 Q.B.D., pp. 537-642; 14 P.D., pp. 49-63; 40 Chy.D., pp. 517-656; 14 App. Cas., pp. 1-105.

BOND—ACCORD AND SATISFACTION TO ONE OF TWO OBLIGEES—SPECIALTY DEBT—PLEADING—PRACTICE.

Steeds v. *Steeds*, 22 Q.B.D. 537, is a decision of Huddleston, B., and Wills, J. The action was brought by two obligees on a bond, and the defendant pleaded that he delivered to one of the plaintiffs goods which he accepted in satisfaction and discharge of the money due on the bond; but it was held that this afforded no defence, in the absence of anything to rebut the *prima facie* presumption that the money advanced on the bond was advanced by the obligees as tenants in common and not as joint tenants. A motion to strike out the defence, however, was refused, but the defendant was ordered to amend by setting up the necessary facts to show that payment to one of the plaintiffs was a sufficient payment to both, and in default of his doing so, judgment was ordered to be entered for the plaintiffs for one-half the amount claimed. The Court remarked on the undesirability of disposing of a case on such a motion, before all the facts were before the Court.

PRACTICE—COSTS—ORD. 65 R. 12—COSTS OF COUNTER CLAIM—(ONT. RULE 1172.)

In *Amon* v. *Bobbett*, 22 Q.B.D. 543, the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.) reversed a Divisional Court on a point of practice. The plaintiff recovered in the action on his claim £48. He was also successful in resisting a counter claim in which the defendant had claimed £123. By Ord. 65 R. 12 a plaintiff who recovers less than £50 in an action of contract is entitled only to costs on the County Court scale (see Ont. Rule 1172). The Court of Appeal, however, held that this *Rule* did not apply to the costs of the counter claim; and that for the purpose of taxation, the claim and counter claim must be treated as independent actions, and that the plaintiff was entitled to costs in respect of his claim according to the County Court scale, but that he was entitled to costs on the High Court scale, in respect of his defence to the counter claim.

MARRIED WOMAN—ANTE NUPTIAL DEBT—JUDGMENT AGAINST WIFE—PROPERTY SUBJECT TO RESTRAINT ON ANTICIPATION—MARRIED WOMEN'S PROPERTY ACT, 1870 (33 & 34 VICT., C. 93) S. 12—(R.S.O. C. 132, SS. 3, 20.)

In *Oxford* v. *Reid*, 22 Q.B.D. 548, judgment had been recovered against husband and wife in 1881 for a debt contracted by the wife in 1879, before her marriage. The judgment was signed against both defendants personally for debt and costs. The wife now appealed from the judgment, contending that it should not in any case have been signed against her personally, but only as against her separate estate; and also that it should not have been signed against

her at all, because the only property she had was certain property she had acquired under the will of a former husband, which, on her marriage to her present husband had been settled subject to a restraint on anticipation. The plaintiff submitted to the judgment being varied by limiting it against the wife's separate property only, and on the other point the Court of Appeal held that as under the Act of 1870 (33 & 34 Vict., c. 93) s. 12 "*any property* belonging to her for her separate use shall be liable to satisfy such debts as if she (*the married woman*) had continued unmarried." The Court could not restrict the judgment to property "not subject to a restraint on anticipation," which limitation of liability was only created by the Act of 1882, s. 19. The Court of Appeal (Lord Esher, M.R., Fry and Bowen, L.JJ.) therefore dismissed the appeal and affirmed the decision of Lord Coleridge, C. J., and Hawkins, J. (Compare R.S.O., c. 132, s. 3, s.s. 2 and *Ib.* s. 20.)

MINES AND MINERALS—RESERVATION—BRICK EARTH AND CLAY.

In *Jersey* v. *Guardians of the Poor*, 22 Q.B.D. 555, the short point decided by the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) on appeal from Day, J., was, that where a conveyance in fee of land reserved "all mines of coal, culm, iron, and all other mines and minerals whatsoever, except stone quarries," a deposit of brick earth, and clay, was included in the reservation, there being nothing in the context to show that the reservation should have a more limited meaning; their Lordships being of opinion that the recent decision of the House of Lords in the *Lord Provost of Glasgow* v. *Fairie*, 13 App. Cas. 657 (see *ante* p. 109), does not overrule the earlier case of *Hext* v. *Gill*, 7 Ch. 699. Speaking of the latter decision Bowen, L.J., observes that it was the decision of Mellish and James, L.JJ. "than whom no greater authorities, I venture to say, have sat in our time in courts of law," and he says, "the result of the authorities, as they say, is this, that a reservation of minerals includes every substance which can be got from under the surface of the earth for the purpose of profit, unless there is some thing in the context or in the nature of the transaction to induce the Court to give it a more limited meaning."

LUNATIC—INQUIRY AS TO SANITY—CHARGES OF WITNESS ENGAGED ON BEHALF OF LUNATIC, RIGHT OF ACTION FOR.

Brockwell v. *Bullock*, 22 Q.B.D. 507, was an action brought by a medical man to recover from a lunatic charges for examining him with a view to giving evidence on behalf of the defendant on an enquiry as to his sanity directed under the Lunacy Act. That Act empowers the Court to direct the costs of such inquiry to be paid by the petitioner, or by the party opposing the petition, or out of the estate of the alleged lunatic. As no such order had been made, the judge of the County Court had non-suited the plaintiff, and on appeal to the Queen's Bench Division that decision had been affirmed. The Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.), however, held that the plaintiff's right of action was not taken away, and therefore ordered a new trial.

INFANT—NEXT FRIEND—CONDUCT OF CAUSE—COMPROMISE.

Rhodes v. *Swithenbank*, 22 Q.B.D. 577, is important as showing the limits of the power of the next friend of an infant, to bind the infant by a compromise. The action was brought to recover damages for personal injuries sustained by the infant through the alleged negligence of the defendant. The plaintiff was non-suited at the trial, and it was agreed by the plaintiff's counsel that there should be no appeal, and in consideration thereof the defendant would not ask costs. The judgment was entered without costs. The plaintiff was without means, and notwithstanding the agreement, applied for a new trial. The Queen's Bench Division refused the application on the ground that the plaintiff was bound by the agreement at the trial, but the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) were unanimously of opinion that the agreement was of no benefit to the infant and therefore not binding on her. Lord Esher, M.R., at p. 578, after remarking that the next friend of an infant plaintiff has the conduct of the action in his hands, goes on to say: "If, however, the next friend does anything in the action beyond the mere conduct of it, whatever is so done must be for the benefit of the infant; and if, in the opinion of the Court, it is not so, the infant is not bound." Of course, as the infant was not bound neither was the defendant, and it was agreed that the judgment should be altered as to the costs.

"HEREDITAMENTS," MEANING OF—JURISDICTION.

In *Tomkins* v. *Jones*, 22 Q.B.D. 599, an inferior Court was by Act of Parliament prohibited from exercising jurisdiction in any action "in which the title to any corporeal or incorporeal hereditaments shall be concerned." In an action to recover an annuity under an agreement made in consideration of the plaintiffs assigning to the defendants certain leaseholds, the defendant pleaded that the plaintiff's title to the leaseholds had not been made out. The question, therefore, was whether the title to any "hereditament" was in question. The Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.) affirmed the Queen's Bench Division in holding that the word "hereditament" was not used as describing the quantum of interest in the subject matter, but as describing the subject matter itself, namely, the land. An application for a *certiorari* was therefore granted.

ACCORD AND SATISFACTION—CHEQUE SENT IN SATISFACTION—RETENTION OF CHEQUE ON ACCOUNT.

Day v. *McLea*, 22 Q.B.D. 610, is a decision of the Court of Appeal, which settles a point of law on which there has been probably a good deal of doubt in the minds of the profession, and which though concerning a matter of every-day occurrence, seems nevertheless never to have been submitted to judicial decision, except in a case of *Miller* v. *Davies*, decided by the Court of Appeal, 10 Nov., 1879, and not reported in the regular reports. A note of the decision, however, may be found in 68 L.T. Ir. 43. The facts of the case were simply these: The plaintiffs had a claim against the defendant for a sum of money as damages for

breach of contract. The defendants sent the plaintiffs a cheque for a less amount than that claimed, stating that it was in full of all demands. The plaintiffs kept the cheque, stating that they did so on account, and brought an action for the balance of their claim. The defendant pleaded accord and satisfaction, and the question was whether the payment in question was, under the circumstances, a satisfaction of the plaintiff's claim. The Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) agreed with Charles, J., that there was no presumption of law that the cheque had been accepted as satisfaction, but it was a question of fact on what terms the cheque was kept. The judgment given in favour of the plaintiffs for the balance of their claim was upheld. Lord Esher says at p. 612: "It is said that the inference of law must be drawn (i.e., *that the cheque is accepted in satisfaction*), even though the person receiving the cheque never intends to take it in satisfaction and says so at the time he receives it. All I can say is that if that is a conclusive inference it would be one contrary to the truth. I object to all such inferences of law."

EXECUTION CREDITOR—WRONGFUL SEIZURE, LIABILITY FOR—INDORSEMENT ON FI. FA.—SHERIFF.

Morris v. *Salberg*, 22 Q.B.D. 614, is a case which shows the care which a solicitor should exercise in indorsing a *fi. fa.* or in giving directions to a sheriff. In this case the action was brought for a wrongful seizure under the following circumstances: The defendant was an execution creditor of G. Morris. His solicitor delivered a *fi. fa.* to the sheriff, and on the writ indorsed a memorandum that the debtor resided at Sarnan Park, etc. This was not the address of the debtor, but the address of the plaintiff in this action, who was the father of the debtor. Acting on the memorandum, the sheriff seized the plaintiff's goods, and the jury found that he was misled into doing so by the direction he had received from the defendant's solicitor. Under this state of facts, the Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.) held, reversing Stephen, J., at the trial, that the execution creditor was liable, on the ground that the indorsement on the writ amounted to a direction to the sheriff to seize the plaintiff's goods.

PENAL ACT—ENFORCEMENT OF.

The Queen v. *Cubitt*, 22 Q.B.D. 622, is useful to note, because it decides that where an Act creating certain offences provided "the provisions of this Act shall be enforced by sea fisheries officers," that the effect of this was to limit to the officers named, the right to prosecute for an offence against the Act, and a rule calling upon justices to hear and determine a summons for an offence against the Act taken out by a private individual, was therefore discharged.

PRACTICE—EXTENSION OF TIME TO APPEAL—RIGHT OF THIRD PARTY INTERVENING.

Esdaile v. *Payne*, 40 Chy.D. 520, is the first case in the Chancery Division calling for attention. In its circumstances it was a little like the case of

Casey v. *Gabourie*, 12 P.R. 252. The action was brought against several defendants to recover tithes. Some of the defendants pleaded the Statute of Limitations, and on an appeal to the House of Lords succeeded in making good that defence. Two defendants, Lane and Neeve, did not set up the Statute, and did not appeal to the House of Lords, and in fact, after judgment against them in the Court below, stated to the solicitor of an intending purchaser of the tithes that they did not intend to appeal, and on the strength of this the purchase was closed. Hill, another defendant, pleaded the Statute of Limitations, but being unsuccessful in the Court below, did not appeal to the House of Lords along with the other defendants. Lane, Neeve and Hill applied, after the decision of the House of Lords, for leave to appeal, notwithstanding that the time had expired, on the ground that their cases were precisely the same as those of the defendants who had appealed. At first the leave was granted to Neeve and Lane to appeal and also to set up the Statute, but on a re-argument of the application, and on its being shown that after the judgment the tithes had been sold on the strength of there being no appeal, the Court (Cotton, Lindley and Lopes, L.JJ.) refused to grant leave to appeal to any of the applicants.

ADMINISTRATION—EXECUTORS EMPOWERED TO CARRY ON BUSINESS—RIGHT OF EXECUTORS TO INDEMNITY—RIGHTS OF CREDITORS OF TESTATOR, AND SUBSEQUENT CREDITORS OF EXECUTORS.

In re Gorton Dowse v. *Gorton*, 40 Chy.D. 536, a contest arose between the creditors of a testator, and the creditors of his executors, who were empowered to carry on the testator's business, as to their relative rights in the assets of the estate. It was held by the court of appeal (Cotton, Lindley and Lopes, L.JJ.) that as against the assets of the testator existing at his decease, the creditors of the testator were entitled, in priority to any claim by the executors to indemnity in respect of the trading liabilities, and that the trade creditors were in no better position than the executors. But as against assets acquired in carrying on the business, the executors had a claim to indemnity out of those assets in respect of trade liabilities in priority to the creditors of the testator, and that the trade creditors were entitled to stand in the executors' place in enforcing their claim to indemnity, but that if the executors were themselves indebted to the estate, their claim to indemnity, and the claims of the trade creditors through them, must abate by the amount of such indebtedness. Cotton, L.J., remarks at p. 539: "Where a business is carried on after the death of the testator, of course the persons who supply goods are in no way creditors of the testator. They cannot make any claim against the executors as executors; but they can make a claim against the executors as the persons who dealt with them, and on whose order they supplied the goods. Then if the executors are entitled to be indemnified, they will stand in the place of the executors in enforcing this indemnity."

PRACTICE—EVIDENCE OF FOREIGN LAW—ACTIO PERSONALIS MORITUR CUM PERSONA.

In *Concha* v. *Murrietta*, 40 Chy.D. 543, two points came up for consideration by the Court of Appeal (Cotton, Lindley and Lopes, L.JJ.), the first being

whether, where the witnesses called to prove a foreign law in their evidence refer to passages in the code of their country as containing the law applicable to their case, the Court may look at the passages and consider what is their proper meaning. The Court as to this decided in the affirmative. The other point was this: By the law of Peru a father is entitled to manage the estate of his infant child and to receive for his own benefit the income during the child's minority. A father during the infancy of his daughter sold a portion of her property, improperly as was alleged, and for less than its value. After his death the daughter claimed to recover compensation out of his estate, and the question was whether the maxim *actio personalis moritur cum persona* applied. As to this point the Court held that the father stood in such a fiduciary position to his daughter that the maxim did not apply to the demand, and that the father's estate must account for what would have been received from the property, if it had been retained in specie.

PRACTICE—REFERENCE TO REFEREE—JUDICATURE ACT 1873 (36 & 37 VICT., C. 66, S. 56), (R. S. O. C. 44, S. 102).

In *Weed* v. *Ward*, 40 Chy.D. 555, the Court of Appeal (Cotton, Lindley and Lopes, L.JJ.) set aside an order of North, J., directing a reference to a referee under the Judicature Act 1873, 356 (R. S. O., c. 44, s. 102), under the following circumstances: The action was brought by the plaintiff for the recision of a contract of partnership between himself and the defendant, on the ground that he had been induced to enter into it by misrepresentation of the defendant as to his profits. The defendant by his defence denied having made any positive statement as to the amount of his income, and stated that the plaintiff had for months prior to the partnership attended at his office as a clerk, and had full access to the books, and had expressed himself satisfied with the business, and that the plaintiff had continued nearly four years in the partnership, which was then dissolved by consent, and that he had never complained to the defendant of misrepresentation. North, J., after notice of trial had been given, on the application of the plaintiff, ordered a reference to a referee as to the amount of the defendant's profits for six years prior to the partnership, but on appeal this order was set aside, the Court holding that such a reference can only be properly directed respecting some question necessary to be tried, and that the question of what the defendant's profits were, would only be material in case the plaintiff established that the defendant made a positive statement as to the amount, and that the plaintiff had entered into the partnership in reliance on that statement, and had not by his conduct lost the right to complain of the misrepresentation. The question referred was one that might never arise, and therefore ought not to have been referred.

VENDOR AND PURCHASER—CONTRACT TO PURCHASE AT A VALUATION—INTEREST—DAMAGES.

Marsh v. *Jones*, 40 Chy.D. 563, involved a very small point. A landlord agreed with his tenant to purchase at a valuation machinery erected on the

demised premises. The term expired at Michaelmas, 1885, but the tenant continued in possession without rent as caretaker until March, 1886, when the landlord took possession. He refused to purchase the machinery, and this action was brought for specific performance, which was decreed; no specific claim was made in the statement of claim for interest or damages. The plaintiff succeeded in obtaining judgment for the payment of the value of the machinery, to be ascertained by a reference, and on a motion to vary the minutes he claimed that he should be allowed interest on the amount ascertained by way of damages, from the termination of the tenancy. The Court of Appeal (Cotton, Lindley and Lopes, L.JJ.) decided that he was only entitled to interest from the time the defendant took possession in March, 1886.

Notes on Exchanges and Legal Scrap Book.

IS THE TAXING MASTER A FAILURE?—For all the information that it affords to the average lay mind, a modern bill of costs might as well be written in the language of the ancient Hittites. The miserable recipient finds himself charged for instructions which he has never given, for advice which he does not know that he has received, and for "copies to keep" which have not been kept. The one part of the document which he finds perfectly to be understanded by him is the total, and the amount of this, in most cases, so far exceeds his wildest fears that he flings aside all philosophic suspense of judgment, and hastily pronounces the whole thing to be "a d—d swindle." If he is a wise man, he will then hasten to abase himself before the man of law, who will generally (for solicitors are seldom unreasonable in this respect) let him off with a much smaller payment than that for which he was at first asked.

If, however, he is one of those who let the sun go down upon their wrath, he will probably insist upon having the bill taxed. If he does, woe to his father's son! He will have great difficulty in appearing by champion, for solicitors (for very obvious reasons) dislike taxing each other's bills, and he will of course have to pay his champion's charges in any event. As few persons care to throw the helve after the hatchet in this fashion, we assume that the wrathful one decides to tax in person. After months of waiting, when his recollection of the facts has naturally become somewhat misty, he is admitted into the presence of the taxing master. If the matter is a Chancery one, this official is a successful solicitor, who has managed to amass a sufficient fortune by the very system on which he is now expected to act as a check. If the cause of the dispute arose out of common law proceedings, he turns out to be a barrister whose practice while at the bar certainly did not include the preparation or investigation of bills of costs. By whichever side of the profession he has climbed to eminence. he has generally about twenty minutes to devote to a case the thorough understanding of which would demand at least a week's

patient study. He is, therefore, but little disposed to listen to the client's confused though impassioned statement of his wrongs. The solicitor, on the other hand, has from his youth been trained to speak with taxing masters in the gate. He knows their foibles, their mode of working, and their hatred of interruption and argument. He knows, too, that the bill through which the taxing master is now wading, striking out an item here and marking for verification a payment there, has been prepared with an eye to this very process, and that he must have been either very careless or very inexperienced if anything like the fatal sixth can be subtracted from what are facetiously called his "profit charges." Hence at the end of the audience, when the litigant is pushed out of the room to make way for those engaged in the new case, he generally finds that he has succeeded in recapturing from his former ally but present foe a very small part of the spoil. And then, when he believes that fate has exhausted her quiver, she pierces him with her sharpest arrow! He learns that as the law has not adjudged his late adviser to disgorge as much as a sixth of the booty, he, the already plundered and tormented client, must pay not only for the copy of the bill on which the taxing master has just operated, not only for the tax that a wise legislature has laid upon taxations (breaking the bruised reed with a vengeance), but also for the time that the persecutor has expended in defending his ill-gotten gains. Can we wonder that he goes down to his house breathing vows of impotent vengeance, and declaring that in future he will submit meekly to any injustice rather than again trust himself to the mercies of the law?

If now we dissect the bill of costs that has caused all this pother, we shall notice that there are some charges which the taxing master has passed as a matter of course, or the amount of which he has rectified without protest from the solicitor whose bill is under taxation. Such are (in the case of an action or other "contentious" proceeding) the instructions to sue and defend, the charges for issuing writs and summonses, the service of notices and other documents, and the invariable "sittings fee," which is supposed to cover the cost of postage and the like. The amount to be charged for each of these items has long ago been decided by Rules of Court, and if any overcharge has been made in any of them, it has certainly been by mistake. These formal charges, however, form but a very small part of any bill of costs, and probably would not afford a decent living to the clerks employed in the conduct of the action out of which they arise. Of the remaining items in the bill, some consist of the numerous payments made out of pocket in the course of the action to counsel and others, and also for court and witnesses' fees. On some, though not on all, of these payments is charged a commission so extraordinary as to afford some ground for the old slander that, when a lawyer puts his hand into his own pocket instead of his client's, he expects to be paid handsomely for his trouble. Thus in London almost invariably, and in the country pretty generally, all the longer documents required to be copied for the use of the court and of counsel are sent to a law stationer. For this the stationer receives 1d. or 1½d. for each folio of seventy-two words. Yet the solicitor is allowed by the taxing master to receive 4d. a folio, or a commission of 300 per cent. for paying the stationer's bill, and the

same practice is followed with regard to the printing of documents. Again, to draw a cheque for a large amount would seem to demand no greater expenditure of time on the solicitor's part than is required for a small one, yet we find that there is in existence a regular "sliding scale" by which a solicitor who "attends counsel with papers" on which 5 guineas is marked gets only 6s. 8d. from his client, while his luckier professional brother who is charged with the delivery of a brief on which 40 guineas appear, receives 2 guineas for exactly similar services. In all these cases the taxing master has really no judicial function at all. If the folios are correctly counted and the fees to counsel have been really paid, he is bound to allow the items without further question. There then remain to be dealt with the costs of drawing the different documents required for the purposes of the action, such as briefs and affidavits. These are paid for strictly according to their length, 1s. a folio being charged in all cases, with a further sum under the head of instructions if they are very important or intricate. With regard to these last, the taxing master *has* a discretion, although from the pressure on his time it can seldom be exercised with much judgment. If, however, he thinks that any of the documents so drawn are unnecessarily prolix, he can (and sometimes does), in addition to docking the amount allowed for "instructions," insist on a smaller number of folios being reckoned than that actually earned. Under these circumstances a brief of one hundred folios is sometimes reduced to fifty, but as, in order to determine what is and what is not unnecessary prolixity, a prolonged study of the whole case would have to be made, it cannot be said that exact justice is always done in this particular to the client or even to the solicitor. Finally, there remain to be dealt with the communications between the solicitors on both sides, and also between the client and the solicitor whose bill is in dispute. In all these items the taxing master's discretion is absolute, but as he can neither, in the time at his disposal, read all the letters that have passed, nor consider in detail the necessity of the interviews that have taken place between the several parties, he generally compounds for them by allowing letters and attendances to an amount which, in the phraseology of the taxing office, the case will "stand."

We have hitherto considered the case of a bill in an action where the costs are paid by a client to his own solicitor. When an unsuccessful litigant has to pay that of his successful rival, a further anomaly appears. In this latter case certain of the costs, such as those attending the employment of extra counsel and the like, are certified by the taxing master, not indeed as being unnecessary, but as meet to be paid, not by the unsuccessful, but by the successful litigant. Hence the latter sometimes finds himself saddled with a bill of so-called "extra" costs exceeding in amount the subject matter of the action. Sometimes, also, bills for "non-contentious" business find their way to the taxing master. Of late these have been much decreased by the order which provides that whenever landed property changes hands for valuable consideration, a commission on the consideration-money shall take the place of the older detailed charges. Settlements, wills and disputes which do not attain to the dignity of an action are still the subject of costs under the old system. In these cases, all

documents are charged for by the length, and the taxing master has absolute discretion both as to these and as to the letters and attendances which make up the greater portion of the bill.

It is proposed, in future papers, to show at length the evils resulting from the present system, and then to point out the remedy which seems to be indicated by the disease. —*Pump Court.*

VEXATIOUS LITIGATION.—Whilst *bona fide* suitors are discouraged by the delay and expense of proceedings in the courts, the same causes are a powerful weapon in the hands of certain litigious persons, who endeavor by persistency to drive their opponents into giving that which the law refuses, or to satisfy their own ambition or personal spite against innocent people. Attempts have lately been made to check such proceedings, and in one case at least the attempt has proved successful. The powers of the court to deal with these cases are not very extensive, and it is important to know exactly what they are.

1. By Order XXV, r. 4, R.S.C.: "In case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just." This rule has two defects: (1) It only applies when the pleadings themselves show that the proceedings are vexatious, and a party can generally so frame his pleadings as to avoid the operation of the rule. (2) An order made under the rule is itself subject to appeal, and there is nothing to prevent a defendant who seeks to get a frivolous action dismissed from being taken up to the House of Lords before he can finally get rid of his adversary.

2. But the court has also an inherent power to prevent abuse of its process by staying vexatious actions, though not shown on the pleadings to be so. This power has been exercised in a variety of cases—for instance, where an action was brought against a clerk of the Petty Bag Office for not sealing a writ which he was not bound to seal: *Castro* v. *Murray*, 32 L. T. Rep. N. S. 675; L. Rep. 4 Ex. 213. One of the first cases of the kind arose out of an action brought for false imprisonment against Mr. Justice Mellor by a prisoner whom he had tried and sentenced. The action failed, and the plaintiff then brought an action for libel against Mr. Justice Mellor's solicitor in respect of the pleadings in the former action. The action was stayed on the ground that it was a gross abuse of the process of the court: *Jacobs* v. *Raven*, 30 L.T. 366. The leading case on the subject is the *Metropolitan Bank* v. *Pooley*, 53 L.T. Rep. N.S. 163; 10 App. Cas. 210. That was an action brought by a bankrupt, whose adjudication in bankruptcy had not been set aside, against the defendant for maliciously procuring the bankruptcy. The House of Lords ordered the action to be dismissed as frivolous and vexatious, and Lord Selborne says that "Before the rules were made under the Judicature Act the practice had been established to stay a manifestly vexatious suit which was plainly in abuse of the authority of the court, although, as far as I know, there was not at that time either any statute or rule expressly authorising the court to do it. The power seemed to be inherent in the

jurisdiction of every court of justice to protect itself from the abuse of its own procedure." Perhaps the case that carries this principle furthest is *Ex parte Griffin*, 41 L.T. Rep. N.S. 415; 12 Ch. Div. 480, where the court refused to make an adjudication in bankruptcy, although there was a good petitioning creditor's debt, and an act of bankruptcy had been committed, upon its being shown that the bankruptcy petition was presented, not with the *bona fide* view of obtaining an adjudication, but as a means of extorting money. And the court will exercise this power, even where the facts are in dispute, if the court is satisfied that allegations are made on altogether insufficient ground: *Lawrence* v. *Lord Norreys*, 59 L.T. Rep. N.S. 703.

But the most important application of this principle is that of restraining a party from taking any further proceedings, except upon certain terms. This was first done in the cases of *Grepe* v. *Loam*, and *Bulteel* v. *Grepe*, 58 L. T. Rep. N. S. 100; 37 Ch. Div. 168. In these actions numerous applications were made by some of the parties for the purpose of setting aside or varying the judgments previously obtained in the actions. Upon one such application the Court of Appeal made an order "that the said applicants, or any of them, be not allowed to make any further applications in these actions, or either of them, to this court, or to the court below, without the leave of this court being first obtained, and if notice of any such application shall be given without such leave being obtained, the respondent shall not be required to appear upon such application, and it shall be dismissed without being heard." This was followed by the case of *Mrs. Davies*, 21 Q. B. Div. 236, against whom a somewhat stronger order was made, viz., "That the said Maria Anne Davies be not allowed to issue any writ or summons, or make any application against any person or persons without the leave of a judge at chambers being first obtained. And if notice of any application or motion be given without such leave being first obtained . . . the respondent shall not be required to appear unless the court shall otherwise order." This order has been acted upon several times, and the court have refused to hear applications made by Mrs. Davies without leave having been first obtained. The weakness of such orders is that they are themselves subject to appeal, and they cannot be made to bind any higher court than that in which they are made. An unfortunate defendant may still be dragged from court to court by a determined plaintiff, and he would be bound to appear in any court above that in which the order was made. It would be very desirable to give a judge at chambers a general power to make orders restraining all further proceedings by a particular party without leave, and relieving any other parties from the necessity of appearing upon appeals from such orders.

3. We must also notice that the court will grant an injunction restraining a party from taking proceedings of a particular kind in violation of an enforceable agreement not to take such proceedings, *Besant* v. *Wood*, 40 L.T. Rep. N.S. 445; 12 Ch. Div. 605, 630, or other entirely unjustifiable proceedings, *Cercle Restaurant Company* v. *Lavery*, 18 Ch. Div. 555.

4. When a frivolous or vexatious appeal is made to the Court of Appeal the appellant may be ordered to give security for costs, *Usill* v. *Hales*, 47 L.J. 380,

C.P., and a party is generally required to do so before appealing to the House of Lords.

5. In the cases of persons suing *in forma pauperis* the court has power to dispauper a party who conducts vexatious proceedings, and he may then be put upon terms as to costs, or compelled to give security, just as other persons may be: *Hawes* v. *Johnson*, 1 Y. & J. 10.

6. A defendant, against whom proceedings are taken maliciously, and without probable cause, has also remedy by action if he can show special damage: *Quartz Hill Company* v. *Eyre*, 49 L. T. Rep. N. S. 249; 50 Ib. 274; 11 Q.B. Div. 674. But, as may well be supposed, this remedy is not often resorted to.—*Eng. Law Times.*

DEFECTIVE STREETS.—By the statutes of the State of Michigan it is provided that "Any person or persons sustaining bodily injury upon any of the public highways or streets in this State, by reason of neglect to keep such public highways or streets . . . in good repair, and in a condition reasonably safe and fit for travel by the township, village, city, or corporation, such township shall pay to the person or persons so injured just damages." The Supreme Court of Michigan in *Joslyn* v. *City of Detroit* reversed the decision of the Circuit Court, which refused damages to the fair plaintiff for injuries received while driving along Clifford Street, Detroit, in the dark. Persons building a house had a pile of sand on the street, from one and a half to four feet high, and extending half way across the street. The sand had been there for upwards of a month. There being no lights or other warning of the obstruction, the plaintiff's carriage came in contact with it, in the dark, overturning the carriage and injuring her seriously. It was contended for the city that it was not liable for damage resulting from obstructions placed there by private persons; but the court held that the city had been guilty of negligence in allowing the obstruction to remain in the street for so long a time.

CAPITAL PUNISHMENT.—The Minnesota Legislature have been imitating ours in respect to providing for capital executions. They have enacted that after sentence the condemned shall be allowed to see no one but his family, his spiritual adviser and his lawyer; that none but the officers and three persons whom he may select shall witness the execution; that it shall be a misdemeanour to print any details of it; and that the taking off shall be by hanging or electricity, as the governor may direct. Here is another blow at the free-and-easy-dom of the press. No reporter allowed to interview the condemned, nor to describe his dying actions! Now hark for a howl of execration from the Minnesota newspapers. For once those of St. Paul and Minneapolis will howl in harmony. But the Legislature have unconsciously bestowed a valuable franchise on the condemned. What a strife and struggle there will be for those three places! The newspaper men will bid high for them, and take their chances of the misdemeanour penalty. We are glad however to see this endeavour to invest capital executions with some dignity and solemnity.—*Albany Law Journal.*

DIARY FOR JULY.

1. Sun. ..... ***First Sunday after Ascension.***
4. Tue..... Maritime Court sits. Lord Eldon born 1751.
6. Sat ..... Easter Term and High Court Justice sittings end. Last day for call notices for Trinity Term.
9. Sun. ..... ***Whitsunday.***
10. Mon..... County Court Sittings for motions in York end.
11. Tue..... General Sessions and County Court Sittings for Trial except in York. St. Barnabas. Lord Stanley, Governor-General, 1888.
15. Sat..... County Court Sittings for motions in York end. Magna Charta signed 1216. Emperor Frederick of Germany died 1888.
16. Sun..... ***Trinity Sunday.***
18. Tue ..... Battle of Waterloo, 1815.
19. Wed..... Battle of Blenheim, 1704.
20. Thur..... Accession of Queen Victoria, 1837.
21. Fri..... Longest day.
22. Sat..... Slavery declared contrary to the law of England, 1772.
23. Sun..... ***First Sunday after Trinity.***
24. Mon..... Midsummer Day.
25. Tue..... Sir M. C. Cameron died 1887.
26. Fri..... Coronation of Queen Victoria, 1838.
29. Sat..... St. Peter.
30. Sun..... ***Second Sunday after Trinity.***

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

[April 30.

Re SMART.

Appeal—Habeas Corpus—Commencement of proceedings—Filing case—Jurisdiction.

In the hearing on a writ of habeas corpus the trial Judge ordered that no further proceedings be taken on the writ, but allowed a petition to be filed under the Infants' Custody Act. By a judgment of the Divisional Court, affirmed by the Court of Appeal, that portion of the judgment relating to the habeas corpus was reversed, and the proceedings on the writ and the petition were ordered to be heard together. The judgment of the Court of Appeal was pronounced on Nov. 13th, 1888. Notice of intention to appeal was given a short time after, but the case was not filed in the Supreme Court until Feb. 18th, 1889.

Held, that in habeas corpus proceedings, where no security is required, nor notice necessary, the first step in the appeal is the filing of the case, and that must be done within sixty days from the pronouncing of the judgment, under s. 40 Supreme Court Act.

Appeal quashed.

S. H. Blake, Q.C., for appellants.

Kerr, Q.C., and *Scott*, Q.C., for respondent.

[May 22.

O'SULLIVAN *v* LAKE.

Appeal—From order for new trial—Jurisdiction—Costs.

By s. 24 (*d*) of the Supreme Court Act, R.S.C. c. 135, an appeal will lie to the Supreme Court from a judgment upon a motion for a new trial, on the ground that the judge has not ruled according to law.

A motion was made to the Divisional Court, supported by affidavits, for a new trial, on the grounds of misdirection, surprise, and of further evidence being necessary on certain points, and it was granted on the ground of misdirection. On appeal, the Court of Appeal held that there had been no misdirection, but sustained the rule on the other grounds.

Held, that no appeal would lie to the Supreme Court from the latter decision.

The respondent, in his factum, did not raise the question of jurisdiction, but objected to the appeal on the ground that the court should not interfere with the discretion of the court below, relying on *Eureka Woollen Mills Co.* v. *Moss*, 11 Can. S.C.R. 91.

Held, that the costs allowed would be costs as of a motion to quash only.

Appeal quashed.

W. Cassels, Q.C., and *Anglin* for appellant.

Robinson, Q.C., and *McLaren* for respondent.

[April 30.

THE QUEEN *v.* JACOBS.

Criminal law—Indictment—Murder—Name of deceased—Variance—Case reserved.

Where two or more names are laid in an indictment under an *alias dictus* it is not necessary to prove them all.

The prisoner, an Indian, was indicted for the murder of Agnes Jacobs, otherwise called Konwakeri Karonhienawita. At the trial evidence

was given identifying the deceased as an Indian woman, known by the Indian name laid in the indictment, but there was no evidence that she was known by the name of Agnes Jacobs. The prisoner was convicted of manslaughter.

Held, affirming the judgment of the Court of Crown Cases Reserved for the Province of Quebec, that proof of the Indian name was sufficient to justify the conviction. *Regina* v. *Frost* (Dears C. B. 474) distinguished. Appeal dismissed.

Cornellier, Q.C., for appellant.

Trenholme for the Crown.

[April 30.

RODBURN *v.* SWINNEY.

Mortgage—Power of sale—Exercise of—Sale under power of attorney—Authority of Attorney—Purchase money—Promissory note.

A mortgage authorized the mortgagees to sell in default of payment on giving a certain notice, and contained a clause that the purchaser at such sale should not be required to see that the purchase money was applied as directed. The mortgagee gave R. a power of attorney to sell under the mortgage, which he did, taking part of the purchase money in cash, and for the balance a promissory note, payable to himself, which he discounted and appropriated the proceeds. The note was paid by the maker at maturity. In a suit to have the sale set aside as fraudulent and made in collusion between R. and the purchaser:

Held, affirming the judgment of the court below, that R. had no authority to take the said note in payment, and the purchaser was bound to see that his powers were properly exercised. The sale was therefore void and must be set aside.

Appeal dismissed.

Geo. C. Gilbert, Q.C., for appellants.

F. E. Barker, Q.C., for respondents.

[April 30.

GEROW *v.* ROYAL CANADIAN INS. CO.

GEROW *v.* BRITISH AMERICAN INS. CO.

Marine Insurance—Constructive total loss.—Cost of repairs—Estimate of—Deduction of new for old.

A policy of insurance on a ship contained the following clause:

"In case of repairs the usual deduction of one-third will not be made until after six months from the date of first registration, but after such date the deduction will be made. And the insurers shall not be liable for a constructive total loss of the vessel in case of abandonment or otherwise, unless the cost of repairing the vessel, under an adjustment as of partial loss, according to the terms of this policy, shall amount to more than half of its value, as declared in this policy."

The ship being disabled at sea put into port for repairs, when it was found that the cost of repairs and expenses would exceed more than one-half of the value declared in the policy if the usual deduction of one-third allowed in adjusting a partial loss, under the terms of the policy, was not made, but not if it was made.

Held, affirming the judgment of the court below, PATTERSON, J. dissenting, that the "costs of repairs" in the policy means the net amount after allowing one-third of the actual cost in respect of new for old, according to the rule usually followed in adjusting a partial loss, and not the estimated amount of the gross costs of the repairs forming the basis of an average adjustment in case of claim for partial loss, and therefore the cost of repairs did not amount to half the declared value.

Appeal dismissed.

Weldon, Q.C., for the appellant.

Barker, Q.C., for the respondents.

[April 30.

MILLER *v.* WHITE.

Evidence—Admissibility of—Entries in defendant's books—New trial.

In an action for goods sold and delivered against McK. and M., the defence was that the goods were sold to C. McK. & Co., the defendant, McK. being a member of both firms. On the trial McK. was called for the plaintiff, and on cross-examination he produced, subject to objections, his books which showed that the plaintiff's goods were credited to C. McK. & Co., though he swore they had been delivered to McK. & M. In the plaintiff's books the goods were charged to C. McK. & Co., which plaintiff swore was done at the request of McK. A verdict having been found for the defendant, the Supreme Court of New Brunswick ordered

a new trial on the ground that the entries in McK.'s books were improperly admitted in evidence.

Held, reversing the judgment of the court below, that the evidence was properly admitted and the rule for a new trial should be discharged.

Appeal allowed.

Weldon, Q.C., and *C. A. Palmer* for appellants.

McLeod, Q.C., and *A. S. White* for respondent.

[April 30.

ALEXANDER *v.* VYE.

Evidence—Admissibility of—Action for libel—Proof of handwriting—Comparison—Recollection.

In an action for libel contained in a letter published in a newspaper and alleged to have been written by the defendant, the publisher of the newspaper was called as a witness to prove that it was so written. He swore that the original MSS. was enclosed in an envelope bearing the post-mark of the town where defendant resided, and that it was accompanied by a letter requesting its publication, which letter was signed by defendant's name; that the MSS. was destroyed after publication and that he had no knowledge of defendant or of his handwriting, but on receiving a letter from him some five weeks later he was able to say, from his recollection of the MSS., that it was in the same handwriting as such letter. This evidence was received, subject to objections, and submitted to the jury, who gave a verdict for the plaintiff.

Held, affirming the judgment of the Supreme Court of New Brunswick, Gwynne, J., dissenting, that the evidence was properly received.

Held, also, Gwynne and Patterson, J. J., dissenting, that evidence could be given to show that defendant had changed the character of his signature since the action was commenced.

Appeal dismissed.

Weldon, Q.C., and *Gregory* for the appellant.

Hanington, Q.C., for the respondent.

[April 30.

HALIFAX BANKING CO. *v.* MATTHEW.

Chattel mortgage — Action to set aside — Fraudulent as against creditors—13 Eliz., c. 5—Right of creditor of mortgagor to redeem.

Plaintiffs having recovered judgment against one H., issued execution under which the sheriff professed to sell certain goods of H. and gave a deed to plaintiffs conveying the "share and interest" of H. in said goods. H. had conveyed the goods to the defendant by a mortgage made six months before the recovery of the plaintiffs' judgment which mortgage covered all the goods proposed to be sold by the sheriff. The plaintiffs filed a bill to set this mortgage aside as fraudulent under Stat. of Eliz. and fraudulent in fact. The court below held the mortgage good and dismissed the bill.

Held, affirming this judgment, that no fraud being shown and the plaintiffs not offering to redeem the mortgage, the action was rightly dismissed.

Appeal dismissed.

W. B. Ross, for the appellants.

Fred. Peters, for the respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Chancery Division.

FULL COURT.] [March 18.

MCNEILL *v.* HAINES.

Sale of standing timber—Real estate or chattels—Sale of right to cut timber for 20 years—Subsequent sale to vendor of the same timber.

Where one sold and assigned to another all the pine timber he might choose to cut for 20 years, with the right to make roads to get to and remove the same, and a covenant that the grantee might, without let or hindrance from anyone, cut and remove the said timber,

Held, that this timber so sold together with the rights imparted to the purchaser were an interest in land.

When having first granted such timber and rights to the plaintiff's assignor, the defendant five years after sold the timber to W., who forthwith proceeded to cut the same,

Held, that the defendant was responsible to the plaintiff in damages, and per FERGUSON, J. that he would have been so, even if the timber sold were chatteled property, for the act of the defendant in selling to W., would in that case amount to a conversion of the property.

J. A. McCarthy, for the plaintiff.

Lount, Q.C., for the defendant.

BOYD, C.] March 25.

Re METCALFE.

Canada Temperance Act—Repeal—Indian Reserve—Indian electors—Prohibition.

Held, on motion for prohibition against the returning officer, that Indian electors resident in the township of Tuscarora, an Indian Reserve, were not competent to vote in the matter of the repeal of the Canada Temperance Act in that county.

Marsh, for the applicant.

Martin for the returning officer.

Irving, Q.C., for the Attorney-General.

FERGUSON.] [April 2.

THE TORONTO GENERAL TRUSTS COMPANY *v.* SEWELL.

Life insurance—Policy effected before marriage—Endorsement in favor of wife after marriage—Who entitled—Administrator or wife—R. S. O. c. 136.

C. B., husband of the defendant, had before his marriage effected three policies of insurance upon his life. After his marriage he endorsed declarations on each of them that all advantage to arise therefrom should be and accrue for the benefit of his wife, but did not sign the same and handed the policies to his wife.

After his death the plaintiffs as administrators of his estate and his wife both claimed the proceeds of the policies. In an inter-pleader issue in which the plaintiffs contended that as the policies were contracts made in the Province of Quebec the law of that Province governed them, and the defendant was not entitled because she could not show that any statute existed in that province similar to the one in Ontario, R. S. O., c. 136, sec. 5, respecting such endorsements on policies,

Held, following *Lee* v. *Abdy*, 17 Q. B. D., 309, that the plaintiffs could not succeed on that contention. But

Held, also, that as C. B. was not "a married man" at the time that he effected the policies he could not (except as provided for by 47 Vict. c. 20., sec. 2), withdraw from the claims of his creditors the benefit of the policies effected before marriage by endorsements or declarations after marriage in favor of or for the benefit of his wife and that the plaintiffs should succeed on the issue.

Marsh, for the plaintiffs.

Moss, Q.C., for the defendant.

FERGUSON.] [April 4.

ADAMSON *v.* ADAMSON, *et al.*

Settlement—Trustees and beneficiaries as joint tenants and not as tenants in common—Executed trusts—Estate in fee—Tenants in common—Mesne profits.

J. A., by a settlement conveyed certain lands to trustees, "Upon trust to hold the said lands, ***, situated ***, being lot No. 2, ***, to the said G. A. And also lot No. 1, situated *** to the said A. A., sons of (the settlors) *** to the use of them, their heirs, and assigns as joint tenants and not as tenants in common *** and lastly upon trust, that the said trustees, ***, shall well and sufficiently convey and assure absolutely in fee to the said parties respectively, etc."

Held, that this trust was an executed trust in which the limitations were expressly declared and that neither a difficulty in ascertaining the true construction and legal meaning of the words used nor the final trust directing the trustees to make the conveyance of the legal estate, made any difference; and that the words must receive the same construction as if they were found in a common law conveyance.

Held, also, that an estate in fee in lot 2 passed to G. A., and that the words, "as joint tenants and not as tenants in common," were used to prevent G. A. and A. A. from taking as tenants in common, as it was supposed they would have taken under 4 Wm. IV., c. 1. s. 48, and that they were needlessly used.

Held, also, that A. A. died intestate and unmarried after January 1st, 1852, the defendants as the children of a deceased brother, took an equal share in the lands as co-tenants in common with the plaintiff, G. A., that they were as much entitled to the possession of the lands as the plaintiff, and that the plaintiff having obtained the legal estate from the trustees, should hold the same as a trustee for all the tenants in common, etc.

Held also, that there being no proof or ouster of the plaintiff, he did not recover from the defendants any mesne profits in this action.

James MacLennan, Q.C., and *R. MacLennan*, for plaintiffs.
McCarthy, Q.C., for defendants, Chas. and Wm. Adamson.
Donald, for defendant, Mary Olive Anderson.
At the trial.

And

The *Attorney-General* of Ontario, and *T. Langton*, for plaintiffs.
McCarthy, Q.C., and *W. Nesbitt*, for defendants.
On the argument.

BOYD, C.] [May 13.

CORHAM *v.* KINGSTON.

Mortgage—Insurance moneys—Application upon mortgage—Appropriation of payments.

Motion for injunction to restrain a mortgagee under a mortgage dated Dec. 16th, 1887, from exercising his power of sale, upon the ground that the mortgage was not in default.

The mortgage was to secure $300 with interest, to be paid yearly, together with an instalment of principal not less than $50, the first instalment of principal and interest to fall due on Dec. 16th, 1888.

On June 29th, 1888, a fire occurred, and the mortgagee received $195 insurance money.

Without communicating with the mortgagor, the mortgagee assumed to apply this in the following way: He reckoned the interest up to the receipt of the money, and deducting that credited the balance on the whole sum advanced; and no payment of the first instalment being made by the mortgagor on Dec. 16th, 1888, he proceeded to exercise his power of sale.

Held, that the rules as to appropriation of payments did not apply, the insurance money not constituting a payment in the ordinary sense of that word, and the mortgagor having had no opportunity of first directing its appropriation.

Held, also, that though the mortgagee had the right to apply the insurance money in satisfaction of the money that ought to be paid under the mortgage, it was not competent to him to accelerate the times of payment, or to alter in any respect the terms of the instrument without the consent of the mortgagor. The insurance money must be applied from time to time as payments fell due under the mortgage, unless otherwise arranged between the parties.

Hoyles, for the plaintiff.
A. H. Marsh, for the defendant.

BOYD, C.] [May 13.

MCGUGAN *v.* SCHOOL BOARD, SOUTHWOLD.

School law—Change of school site—Meeting of ratepayers.

This was an application to have it declared that a certain resolution changing the site of a public school passed at a public meeting of the ratepayers called for the purpose was void, and also that certain conveyances made in pursuance of such resolution were void. It appeared that at the meeting a proposition and also an amendment were submitted, both of which, in addition to the main question as to change of site, embraced matters collateral thereto.

Held, that the main question had not been so presented to the ratepayers as to give them a fair opportunity of voting upon the material point, and that the vote taken could not be considered as unequivocally indicating the mind of the majority on that particular point. Resolution declared invalid and conveyances set aside, but without costs.

Meredith, Q.C., and *Crothers*, for the plaintiff.
Doherty, for the individual defendants.
Glen, for the corporation.

BOYD, C.] [May 13.

Re GRAHAM AND RENFREW.

Trustees—Power to sell—Implied power to take back mortgage.

Petition under Vendor and Purchaser Act.

Under a certain conveyance power was reserved to the trustees named therein to sell

upon consent of the majority of the infants who had attained 21.

Three were of age and willing to consent. It was argued that they had no right to sell as they did, and take back a mortgage for part of the price.

The will gave them power to sell at public auction or private sale, as to them may seem best, etc. The sale was bona fide and a good price was obtained.

Held, that the right to sell existed, and that a subsequent provision as to the children buying from one another on attaining 21 was not inconsistent with or repugnant to the exercise of the power of sale at present. That provision would still be operative, if no previous sale were made.

Held, also, that the power of sale given by the will involved a power to secure part of the price by mortgage on the property sold, the manner of sale being left to the discretion of the trustees, and that, therefore, the vendors should have judgment in their favor on both points.

A. Morphy, for the vendor.

S. G. Wood, for the purchaser.

Practice.

ROSE, J.] [May 20.

Re BACKHOUSE *v.* BRIGHT.

Prohibition—Division Court—Ex parte order for new trial.

At the moment when a Division Court action was called for trial the plaintiff and his agent were accidentally absent from the court, and the action was dismissed without any trial. The plaintiff afterwards obtained from the Judge *ex parte* an order for the restoration of the case to the docket for trial at the next sittings. The defendant made a motion to rescind this order which was refused, and he then applied for prohibition.

Held, that the Judge had power to dispense with notice of motion for the order; and the motion for prohibition was refused.

Carter v. *Smith*, 4 E. & B. 696; *McLean* v. *McLeod*, 5 P. R. 467; and *Fee* v. *McIlhargey*, 9 P.R. 329, referred to.

Aylesworth, for the motion.

J. A. Paterson, contra.

Q. B. Div'l Ct.] [May 20.

BARLOW *v.* GREEN.

Jury notice—Action of ejectment—Equitable defence.

The action was for ejectment, but the defendant by his statement of defence alleged that he was in possession of the land in question under a contract made with his father, whose executors the plaintiffs were, that if he (the defendant) went on the land and worked it his father would give it to him at his death, and he prayed to have the agreement declared valid, himself declared the owner of the land, and the plaintiffs ordered to execute proper documents to perfect his title.

Held, that the action, upon the pleadings, came within the words of R.S.O. c. 44, s. 77: "All causes, matters, or issues, over the subject of which prior to the Administration of Justice Act of 1873, the Court of Chancery had exclusive jurisdiction"; and a notice for jury was therefore improper.

C. J. Holman, for plaintiffs.

F. R. Powell, for defendant.

Court of Appeal.] [May 28.

ROWLANDS *v.* CANADA SOUTHERN R. W. CO.

Appeal to Supreme Court of Canada—Judgment of Court of Appeal upon appeal from Divisional Court refusing new trial—Notice of appeal—R S.C.c. 135, *ss.* 24 (d), 41—*Extension of time—Circumstances of case.*

The decision of MACLENNAN, J.A., at Chambers, *ante* p. 283, was affirmed by the full Court of Appeal.

R. M. Meredith, for the plaintiff.

H. Symons, for the defendants.

Mr. DALTON, Q.C.] [May 25.

KANE *v.* MITCHELL.

Payment of money into court—Taking out—Satisfaction—Rule 632.

The plaintiffs sued for work and labor as contractors, claiming a balance of $511. The defendant by his statement of defence denied all the allegations in the statement of claim, and also said that $300 was sufficient to satisfy the plaintiffs' whole claim, and he paid that sum into court in satisfaction of such claim.

Rule 632 provides that "the payment of money into court shall not be deemed an admission of the cause of action in respect of which it is so paid."

Held, that the plaintiffs were not entitled to take out the money paid into court, unless they took it in full satisfaction of their claims.

John Greer, for the plaintiffs.

Montgomery, for the defendant.

Q. B. DIVISIONAL COURT.] [May 27.

GILBERT *v.* STILES.

Arrest—Ca. sa.—Order for—Motion to set aside —New material—Copy of affidavit—Affidavit on information and belief—Rule 609—Exhibits.

Upon an application to set aside an order for a *ca. sa.* upon the ground that it is based upon insufficient material, as distinguished from a motion to discharge the defendant from custody upon the merits, no new material can be used.

Damer v. *Busby*, 5 P. R. at p. 389, followed.

In this case an order for a *ca. sa.* was granted upon two affidavits; one that of the Toronto agent for the plaintiff's solicitors, exhibiting a copy of an affidavit made by one of such solicitors, stating that he believed it to be a true copy, and that the original was stated to have been enclosed in a letter received by him that day, but was not so enclosed, but not stating that such an affidavit ever existed.

Held, that this could not be treated as forming any evidence upon which an order for arrest could be founded.

The other affidavit used, stated that the deponent was credibly informed and believed certain facts, not stating the name of his informant nor the grounds of his belief.

Held, that this statement did not comply with Rule 609, and was insufficient as proof of the facts stated, upon an application for such an order.

Giblins v. *Spalding*, 11. M. & W., 173; *McInnes* v. *Macklin*, 6 U. C. L. J., 14, referred to.

The copy of affidavit marked as an exhibit to the affidavit of the Toronto agent, was not filed as an exhibit, and was subsequently produced to the Court as an original affidavit, a new jurat having been added.

Held, per FALCONBRIDGE, J., that the exhibit, even though it was not actually in the hands of the officer of the Court, was part of the record of the case, and should not have been so dealt with.

ROSE, J.] [May 29.

HAMILTON PROVIDENT & LOAN SOCIETY *v.* MCKIM.

Notice of trial—No power to shorten time—Rules 485, 661.

A defendant is entitled to the full ten days notice of trial prescribed by Rule 661, unless he has consented to take short notice of trial, or unless short notice can be directed as a term for granting an indulgence sought by a defendant; and there is no power under Rule 485 or otherwise to compel a defendant to take short notice.

John Crerar, for plaintiff.

Aylesworth, for defendants.

Law Students' Department.

The following papers were set at the Law Society Examination before Easter Term, 1889:

FIRST INTERMEDIATE.

REAL PROPERTY.

1. What is an estate in land? Is a lien an estate?

2. What words are used in conveyancing for the purpose of creating an estate tail?

3. What was the decision in *Taltarum's Case*, and what was its effect?

4. How was a mortgage regarded at law, how in equity, and how at the present day?

5. Define *dower* and *estate by the courtesy*, stating the essentials of each.

6. A tenant in tail buys the fee simple. What is the effect? Why?

7. What is a term of years?

SMITH'S COMMON LAW.

1. What is the law as to the liability of a person for an injury done to another by *accident* or *mistake?*

2. Illustrate by example the difference between *direct* and *consequential* injury.

3. When will a person become of full age who was born on the first day of January, 1870? give the hour and minute.

4. Explain what is meant by *tenant's fixtures?*

5. Explain the meaning of *primary* and *secondary* evidence.

6. In what cases of defamation are *spoken* words actionable *per se?*

7. Are threats of bodily hurt ever actionable? If so, when?

CONTRACTS.

1. How far is the proposition true that an acceptance of proposal is complete as against the acceptor when it comes to the knowledge of the proposer.

2. "The consideration for a promise may be an act or a forbearance or a promise to do or forbear." Give an instance of each.

3. What are the limits to the contractual powers of a corporation?

4. What rights has an injured person in respect of affirmance or avoidance of a contract when fraud is discovered by him?

5. How far can a man be relieved from a contract which he knew to be unlawful?

6. A promissory note is drawn on the 2nd February, 1889, at three months. When is such note payable? Why?

7. Explain the difference between a *general* and *qualified* acceptance. How does it affect the duties of the holder?

EQUITY.

1. Explain the maxim "That equality is equity."

2. Into what different heads are trusts divided?

3. Define constructive fraud and give an example.

4. Distinguish between the relief granted in cases of specific performance: (1) In cases of contracts for sale of land. (2) Cases of contracts for chattels.

5. A. makes a mortgage to B. with interest at six per centum per annum, a clause is inserted in the mortgage that if the six per cent. be not punctually paid, seven per cent. shall be paid. State the effect of this.

6. State the law of satisfaction in cases of legacies to creditors.

7. Explain the doctrine of election, giving an example.

FIRST INTERMEDIATE HONORS.

REAL PROPERTY.

1. How is the descent of estates tail governed?

2. Explain the operation of the conveyance by *Lease and Release.*

3. What is now, and what was formerly, the effect of a conveyance to a husband and wife and a third person?

4. Has a wife dower in a remainder? Explain fully.

5. What is a covenant to *stand seised?* Explain fully its essentials, and operations.

6. What is meant by saying that there can be no use upon a use?

7. For what purpose was the statute of *Quia Emptores* passed? Explain fully.

SMITH'S COMMON LAW.

1. Give an example showing that two actions may be brought by different plaintiffs against a trespasser for the same trespass to land.

2. Explain the doctrine of *privileged communication.*

3. What facts are necessary to establish the defence of *contributory negligence?*

4. Explain the extent of the liability of an executor for loss of the assets of the deceased testator.

5. Give an example of a transaction having a *contractive*, a *tortious*, and a *criminal* aspect.

6. Explain the law as to the liability of owners of cattle for trespasses committed by the cattle (*a*) irrespective of the existence of fences, (*b*) when the trespass is caused by defective fences.

7. What effect (if any) has the recovery of judgment against one of two joint wrong-doers upon the liability of the other? Reasons.

CONTRACTS.

1. At what time may protest of a dishonoured bill be made after non-acceptance?

2. A promissory note falls due to-day. It is unpaid and protested. From what date does interest run. The note reads thus: "Three months after date I promise to pay A.B., or order $x at the Bank of T. here, to bear interest at seven per cent. (Signed) C. D."

3. Distinguish "*void*," "*voidable*," and "*unenforceable*," as applied to contracts.

4. Give instances where rights and liabilities created by a contract pass to other than the original parties by operation of law.

5. A., a merchant in Hamilton, offers by letter to B., a merchant in Belleville, a number of patent reapers. B., by letter, accepts the offer, but after posting the letters changes his mind and telegraphs to A. withdrawing his letter. Letter and telegram both reach A., the latter first. How far is B. bound? Why?

6. A. intends to offer to B. three lots in West Toronto Junction for $600, three lots in Parkdale for $600, and one lot in the city at $1,600. By mistake in addition, he offers them all at $2,600, which B. accepts. Although A. sends B. notice that the offer was made by mistake, B. insists on holding the sale. Can he do so? Why?

7. What is the effect of acquiescence in a breach of condition?

EQUITY.

1. Define and exemplify constructive notice.

2. State the general law as to the liability of trustees and executors respectively for each others' acts.

3. "A." owes "B." at the present date several different sums, one of which is on a promissory note for $1,000 made in January, 1883, he pays in $500, saying nothing as to what item of account it is to be applied on. Can "A." apply it on the note and thereby take it out of the provisions of the Statute?

4. State the principle followed by the Courts in granting injunctions in cases of alleged breach of a patent of invention.

5. Under what (if any) circumstances will relief be granted in cases of contracts entered into under mistake of law?

6. State the relief granted by equity in cases of defective execution of powers and non-execution of powers respectively.

7. A. and B. enter into partnership for the term of five years, the time expires and they continue going on with the business in the same way as before, nothing being said about a new partnership. How would this transaction be considered in equity?

Miscellaneous.

A GOOD story is told about the two celebrated ecclesiastical lawyers, Mr. Jeune, Q.C., and Sir Walter Phillimore, Q.C. They appeared recently before the Archbishop's Court on behalf of the Bishop of Lincoln, to object to the jurisdiction of the court in his case. The archbishop, in full vestments, entered the court, and raising his hands, said: "Let us pray." Mr. Jeune, as became the son of a bishop, at once knelt, but Sir Walter, realizing that he was there to take objection to the court, remained standing. When the court was up, Sir Walter upbraided his colleague for his illegal praying. "My dear Phillimore," said Mr. Jeune, "I was praying without prejudice."

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for the weeks ending May 18th and 25th contain The Migration of Plants, *Edinburgh;* Motley's Correspondence, *Quarterly;* Edmond Scherer, *Fortnightly;* Our Reign in the Ionian Islands, *Nineteenth Century;* The First Special Correspondent, *National;* The Young Sulpicius, and Leigh Hunt, *Macmillan;* Quite Out of the Way, *Murray's;* In Ninety-eight, *Time;* Father Damien and the Lepers, *Longman's;* The Country of a Thousand Lakes, *Chambers';* Tipping, *All the Year Round;* Clothes and Conduct on Board an Old Indiaman, *Athenæum;* The Italians and the Republic of the Plate, *Spectator;* Springs in the South of Europe, *Nottingham Express;* with instalments of "Little Sister," and "How 'the Crayture' got on the Strength," and poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with clause four of this Curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be), on conforming with clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher and pay $1 fee; and on or before the first day of presentation or examination file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hiliary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday of June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term, at 9 a.m. Oral on the Wednesday, at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term, at 9 a.m. Oral on the Friday, at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term, at 9 a.m. Oral on the Thursday, at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term, at 9 a.m. Oral on the Thursday, at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after admission on the books of the society as student or articled clerk.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the

First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term. Candidates for Certificates of Fitness are not required to give such notice.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

24. All notices may be extended once, if request is received prior to day of examination.

25. Printed questions put to Candidates at previous examinations are not issued.

FEES.

Notice Fee	$ 1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM for 1889 and 1890.

Students-at-Law.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil Æneid, B. 1 V.
- Cæsar, B. G. b, I.) 33.)

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic : Algebra, to the end of Quadratic Equations : Euclid, Bb. I. II. and III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical reading of a selected Poem :

1889—Scott, Lay of the Last Minstrel.

1890—Byron, The Prisoner of Chillon ; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the

Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek :—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.

1889—Lamartine, Christophe Colomb.
1890—Souvestre, Un Philosophe sous le toits.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography ; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid Bb. I. II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of clerkship mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition ; Manual of Common Law ; Smith's Manual of Equity ; Anson on Contracts ; the Act respecting the Court of Chancery ; the Canadian Statutes relating to Bills of Exchange and Promissory Notes ; and Cap. 123 Revised Statutes of Ontario, 1887, and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition ; Greenwood on Conveyancing, chaps, on Agreements, Sales, Purchases, Leases, Mortgages, and Wills ; Snell's Equity ; Broom's Common Law ; Williams on Personal Property ; O'Sullivan's Manual of Government in Canada, 2nd edition ; the Ontario Judicature Act ; R.S.O., 1887, cap. 44, the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110 143.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles ; Taylor's Equity Jurisprudence ; Hawkins on Wills ; Smith's Mercantile Law ; Benjamin on Sales ; Smith on Contracts ; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons ; Pollock on Contracts ; Story's Equity Jurisprudence ; Theoba'd on Wills ; Harris's Principles of Criminal Law ; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers : Best on Evidence ; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Michaelmas Term, 1888.

BISHOP RIDLEY COLLEGE

OF ONTARIO, LIMITED.

ST. CATHARINES.

A Protestant Church School for Boys, in connection with the Church of England, will be opened in the property well-known as "Springbank," St. Catharines, Ont., in September next, 1889.

Boys prepared for matriculation, with honors in all departments, in any University ; for entrance into the Royal Military College ; for entrance into the Learned Professions. There will be a special Commercial Department. Special attention paid to Physical Culture. Terms moderate. For particulars apply to the Secretary, 26 King St. E., Toronto.

FRED. J. STEWART, *Sec.-Treas.*

The Canada Law Journal.

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THE ways of the Local Legislature are past finding out. It would be not unreasonable to suppose that when an Act had been discovered among the productions of any given session amending any of the consolidated statutes, and the enquirer after statutory truth had carefully perused such amending Act, he might peacefully conclude that he had "got on to" all such amendments made in such session. Let him take heed to his ways, however, for among the Acts of the session just concluded we find three different Acts containing amendments of the Ontario Insurance Act: sec. 106 is amended by chap. 30; sections 109 and 127 by chap. 31; and sec. 137 by chap. 32. Truly this may be called "harassing legislation." Another small joke, for we do not wish to be considered deficient in humour, is perpetrated by chap. 17, which by sec. 6 gives to 51 Vict., c. 13, new a subsection 3 to section 15, and then by sec. 10 enacts that "subsection 3 of section 15 is hereby repealed." The old subsection 3 of section 15 had clearly been repealed by sec. 6, so this other subsection 3 of sec. 15 must of course refer to the new one created by that section—a clear case of legislative infanticide.

AN esteemed correspondent in Ottawa writes us as follows in regard to Law Reform amongst that progressive people, the Japanese:

"Mr. Torn Hoshi, a barrister of Tokio (Yeddo), Japan, spent very recently ten days in Ottawa. I had the pleasure and profit of a private interview with him. He is a short, thick-set, middle-aged man of courteous manners and pleasing countenance, and speaks English correctly, but not fluently. He was educated in law at the Middle Temple, England, and now displays his professional 'shingle' in Tokio, Japan. He belongs to the Samurai or gentry, and was entitled to wear two swords, before the abolition of this custom some eight years ago. His object in visiting Canada was to become acquainted with our political institutions and legal systems. He stated to me that Japan had adopted a civil and criminal code of laws, prepared by a Mr. Boissonade, and based on the French codes, but modified by an interjection of Japanese customary law. The codes of commerce and procedure are in preparation; they will be framed after the English, German, and French laws. Inasmuch as, after the establishment of a direct steamship line between British Columbia and Japan, Ontario will be placed in commercial and legal relationship to the two countries of Quebec

and Japan, both using French law to a great extent, would it not be wise to endow a chair of French law, or better, of General Jurisprudence in the Law School at Toronto. Even if an Ontario lawyer was certain never to have a Japan or Quebec case, he would be much the better lawyer for a knowledge of the Code Napoleon and of the procedure in the Courts in the Province of Quebec."

As the curriculum of the proposed Law School must soon take definite form, our correspondent's suggestion is timely. We fear that comparative jurisprudence receives too little attention in Canada; but whilst we are obliged to our correspondent for his suggestion as to "a chair of French law at Toronto," we think there is quite enough French-ism in Quebec without bringing it further west. Not at present, thank you!

THE EFFECT OF PAYMENT AS A BAR TO THE STATUTE OF LIMITATIONS.

IT has been generally assumed in this province that the effect of payments on account of principal or interest due on simple contract debts as a bar to the Statute of Limitations, is unaffected by the statute (R.S.O., c. 123) requiring acknowledgments of debts to be in writing. It may be that the assumption is well founded; at the same time, in arriving at this conclusion, we believe a very important fact has been lost sight of, which at all events is, to say the least of it, calculated to cast some little doubt on the correctness of the generally received opinion. That fact is this: that in Lord Tenterden's Act, 9 Geo. 4, c. 14, the effect of payment is expressly saved, the proviso in that Act being as follows: "Provided always that nothing herein contained, shall alter, or take away, or lessen, the effect of any payment of any principal or interest made by any person whatsoever;" but this proviso in not to be found in the Ontario Act, R.S.O., c. 123.

We have not been able to find any case in which this variance between the Ontario Act and the English Act has been discussed. Not very many cases on the effect of payment, upon the revising of the Statute of Limitations, have been reported in our Courts; and in all of these to which we have referred, it seems to have been assumed that the Acts were identical. Thus in *Ball* v. *Parker*, 39 U.C.Q.B. 488, Harrison, C.J., says, "Since the passing of C.S.U.C., c. 44 (which is the same as 9 Geo. 4, c. 4, commonly called Lord Tenterden's Act in England) nothing after the lapse of six years will revive the debt except part payment, or an acknowledgment in writing signed by the party chargeable thereby." This case went to appeal (see 1 App. R. 593), but there also the judges assumed that the statute had made no difference in the effect of payment; and in *Boulton* v. *Burke*, 9 O.R. 80, and *Tilley* v. *McIntosh*, recently before Armour, C.J., (not yet reported) both Counsel and the Court seem to have assumed that such was the case. Prior to Lord Tenterden's Act, payment on account was regarded as a species of acknowledgment of the debt, and it was on this

ground that it stopped the running of the statute. As the law then stood, three might be acknowledgments in writing, and acknowledgments by parol, and acknowledgments by the act of payment on account. The effect of the English Act is undoubtedly to render parol acknowledgments insufficient, and to make it necessary that all acknowledgments, other than by payment, shall be in writing, signed by the party to be charged, but it expressly continues the former effect attributed by the Courts to payments on account.

It may be argued in favour of the generally received opinion as to the effect of the Ontario Act, that as it declares that "no acknowledgment or promise *by words only* shall be deemed sufficient," it impliedly saves the effect of payments, because, it may be said, payments are not acknowledgments by "words only," but acknowledgments by an act, viz., the act of paying money, and, therefore, not within the words of the statute. Some of the other sections of the Act also seem to favour the assumption that payments may have the effect of barring the statute; for example, section 4 provides that payments on account of a bill of exchange or promissory note shall not be deemed sufficiently proved by an indorsement of payment made by, or on behalf of, the person to whom the payment is made. This may be said to imply that if payment can be otherwise proved, as, for instance, by the testimony of a witness who saw the payment made, that that would be sufficient to bar the statute. The second and third section also appear to assume that payments may operate as a bar of the statute. In section 2 it is provided that payments by one of two or more joint contractors, or executors, or administrators shall not affect the others; and section 3 enacts that if it appears at the trial that the plaintiff is entitled to succeed as to one joint contractor, executor, or administrator, by virtue of a payment made by him, judgment may be given in his favour as to that defendant, though he may fail as to the others. But on the other hand it may not unreasonably be argued that these provisions are not inconsistent with requiring that payments on account to be of any avail must be evidenced by writing signed by the payer.

It may, however, be correct that a payment on account has, under our statute, the same effect as in England; at the same time the omission of the proviso in our statute, of the clause which appears in the English Act, saving the effect of payment, is significant, and we are inclined to think the fact of its omission has hardly received the consideration which it deserves, either from the Bar or the Bench.

ESTATES TAIL.

THE third section of the Devolution of Estates Act (R.S.O., c. 108) which defines the classes of real estate which are to devolve on the personal representative, it may be observed, does not include estates tail, either general or special, in its operation. It is confined to "estates of inheritance in fee simple, or limited to the heir as special occupant," whether corporeal or incorporeal, and it is only such estates of freehold that, under section 4, devolve on the personal representative of a deceased owner. Estates tail, general and special, therefore,

existing on the 1st of July, 1886, are left to the operation of the law as it existed prior to that date; and on the death of the tenant in tail the heir in tail will be entitled to succeed, and the personal representative of the deceased tenant will have no right in the land. But in case any then existing estate tail is barred, can it be re-entailed? Or in other words, can an estate tail be created since the 1st July, 1886? By the 10th section of the Devolution of Estates Act it is provided that, "In the case of a person dying after the first day of July, 1886, his personal representatives for the time being shall, in the interpretation of any statute of the Province, or in the construction of any instrument to which the deceased was a party, or in which he was interested, be deemed in law his heirs and assigns, unless a contrary intention appears."

From this section it seems clear, that under a limitation to a man "and his heirs," the personal representatives of the grantee who dies after the 1st of July, 1886, would be entitled, in the event of his dying without having conveyed away the land in his lifetime. But suppose in addition to the word "heirs" the words "of his body" are added, will the word "heirs" in that connection be taken to mean the personal representative? or will the introduction of the words "of his body" be taken to indicate "a contrary intention" within the meaning of section 10? Possibly some help may be obtained in arriving at a conclusion by reference to R.S.O., c. 100, s. 4, which provides that in deeds or other instruments executed after 1st of July, 1886, no words of limitation at all are necessary for the limitation of an estate in fee simple, or fee tail, general or special, and that the word "heirs," or "heirs of the body," or "heirs male," or "heirs female of the body" need not be used for the creation of an estate tail general or special. It is sufficient in order to create an estate tail to use the words "in tail," or "in tail male," or "in tail female," according to the limitation intended. This section appears to indicate that, notwithstanding the Devolution of Estates Act, which also came into operation on the 1st of July, 1886, estates tail may still be created, otherwise there would be no object in making this provision. It being thus apparent that estates tail may still be created, it seems to follow that where technical words are used, which, according to the common law, would create an estate tail, those words must be still so construed, and the additional words so used must be held to imply "a contrary intention," which would prevent the word "heirs" having, in that connection, the meaning of "personal representatives."

But though it would seem probable that an estate tail may still be created by either deed or will, it may be well to notice that when the estate tail is created by will, the devisee will not, as formerly, be entitled to take the estate immediately from his testator; the devise in tail cannot prevent the devolution of the estate in the first place upon the personal representative, who, after due administration of the estate, would no doubt be bound to convey it, if not required for the satisfaction of debts, to the devisee in tail according to the tenor of the devise.

We have always thought, and still think, that the exemption of estates tail from the operation of the Devolution of Estates Act was a great mistake. The palpable injustice of so doing is apparent the moment the subject is seriously

considered. An owner of an estate tail, as we all know, except in certain exceptional cases, has as complete dominion over his estate as an owner in fee simple, and by the execution of a formal deed he may, in most cases, at any time effectually convert his estate in fee tail into a fee simple. An owner of such an estate may contract a large amount of debts on the faith of his having this estate, for creditors are not usually very particular in inquiring the precise technical interest their debtor may have in property, of which, to all outward appearances, he is the absolute owner. Such a man dies without barring the entail, and the result is that the property devolves on the heir in tail, and the creditors have no right to follow it. That, we do not think, is a very satisfactory state of affairs; it appears to be simply a device sanctioned by law for enabling a man to obtain credit by false appearances, and then to withhold his property from liability to the claims of his creditors.

CONTEMPT OF COURT IN CANADA.

THE decision of the Supreme Court of Canada in the case of *Queen* v. *Howland* (reported in 11 O.R. 633, and in 14 A.R. 184), or rather the written reasons of the judges, copies of which are now before us, places the law of contempt of court upon a very clear, and we venture to think, very satisfactory footing.

The facts of the case were very simple. The editor of this journal acted as solicitor for Mr. Howland in some *quo warranto* proceedings which were taken against him after his first election as Mayor of Toronto, in 1886. He had also acted as chairman of Mr. Howland's committee during the mayoralty contest. On March 23rd, 1886, Mr. Dalton, Master in Chambers, gave judgment declaring Mr. Howland not to possess the requisite property qualification. On March 24th an article appeared in the *Mail*, expressing the view that Mr. Howland had made a bad blunder in running for Mayor when not properly qualified. On March 26th Mr. O'Brien gave notice of appeal from Mr. Dalton's decision, and also wrote the letter to the *Mail* newspaper, which was published in that paper on the 27th, and was the *fons et origo mali* in these contempt proceedings. On March 29th Mr. O'Brien, as solicitor for Mr. Howland, wrote a letter to the solicitors of the relator, notifying them that it was Mr. Howland's intention to abandon the appeal, and on the same day he served upon them a formal notice of abandonment. Upon the same day, also, and after receiving this letter and notice, the relator served a notice of motion to commit Mr. O'Brien for contempt of court in writing and causing to be published the letter to the *Mail while the proceedings were still pending*.

Now, seeing that the appeal had been formally abandoned before the notice was served, it has always appeared to us that, apart altogether from the contents of the letter in question, this was a most impudent attempt on the part of the relator to justify his motion after abandonment of the *quo warranto* proceedings, and constitute himself the champion of the Court under circumstances in which he was no more interested than any other person, and as though the Court was not abundantly able to protect its own dignity without the assistance of his

intervention. The Supreme Court judgments entirely uphold this view, and treat the whole case, we venture to say, in a masculine way, which contrasts very favourably with the judgment of the judge of first instance, and that of the majority of the then Court of Appeal who sat upon the case.

In the first place, then, we would call attention to the fact that the Supreme Court have now placed the right of appeal in such a case as this beyond question, unless, indeed, the Legislature should interfere in what would be, in our opinion, the very mischievous manner suggested by Taschereau, J. The power to deal summarily with contempt is no doubt one which Courts should possess, but just because it is summary, its exercise should be most carefully hedged in and guarded, and in every case when it is exercised in respect to constructive contempt, such as was in question here, the right of appeal should be conceded. To a man of sensitive honour, whether a member of the legal profession or not, it is no light thing to be branded by a judge as having been guilty of contempt of court, and it is just those who have the strongest feeling of the duty of a good citizen to uphold the chosen dispensers of justice, who will feel the most bitterly such an imputation. We in Canada should be on our guard against that disregard of the rights and feelings of the individual, which is one of the worst among the many bad features of modern democracy.

Another matter of observation is that the Supreme Court altogether declined to accede to such a purely technical manner of treating this case as would regard it as of no consequence that the appeal, of which notice had been given, had been formally withdrawn before the relator made his application to the Court (vide 11 O.R., at pp. 641 and 644; 14 A.R., at pp. 196-7). On the contrary, Mr. Justice Gwynne says in his judgment: "That the letter could have no such tendency (viz., to interfere with the due administration of justice) after abandonment of the appeal of which notice had been served is admitted on the face of the order, which is the subject of the present appeal; but if for that reason the letter was innocuous when judgment was given upon the application to commit, it was equally innocuous when the motion was made, for the notice of abandonment had then already been served, so that the relator was then deprived of the ground upon which alone he invoked and persistently pressed for the interference of the Court." And Mr. Justice Strong in like manner, after referring to the dates, says: "When the notice of motion was served all proceedings by way of appeal had been abandoned, so that, as I hold, agreeing in that respect entirely with Mr. Justice Burton in the Court of Appeal, the respondent had no *locus standi* entitling him to make the motion which he did, treating the letter as a contempt as having a tendency to exercise an undue influence over the regular course of justice, inasmuch as all proceedings had reached a final termination. Agreeing again with Mr. Justice Burton, I do not think we are called upon to consider whether this letter was a contempt included in another class of such offences against the administration of justice, namely, as containing injurious reflections upon a judicial officer of the Court. The respondent has manifestly not based his motion on any such ground, and, even if he had, the matter was one with which he was not concerned, if I am right in holding that the proceedings in

the *quo warranto* case had terminated, but it was for the Court, on the publication being brought to its notice, if it considered the letter a contempt, to have interfered *ex officio*, and called the appellant to account for his contumacious conduct." Mr. Justice Gwynne further quotes with approval the words of Lord Justice James in *Plating Co.* v. *Farquharson*, 44 L.T.N.S. 389, that applications such as this are in themselves a contempt of court, because they tend to waste the public time. And we may supplement this from the words of Chitty, J., in *Metropolitan Music Hall* v. *Financial Times*, printed *in extenso* in *Pump Court* for March 6th of this present year: "The Court ought, when it sees the case is one in which the party is not *bona fide* trying to assert the law of contempt, but is merely seeing if he cannot make the respondent pay some costs, it ought not to encourage him to come to the Court;" and he made the applicants in that case pay the costs. We may add that their Lordships may almost be said to laugh out of Court the suggestion that under any circumstances the decision of the judge in chambers could have been influenced by the letter in question, pointing out what we should have supposed obvious enough, were it not for the decision of the learned judge of first instance, that there is a great distinction in such matters between a case which is pending before a judge, and one which is to come before a jury.

Now, to come to a consideration of the letter to the *Mail*, on the supposed improper character of which the judgments below are based, it may be remembered that the impropriety was supposed chiefly to be in that paragraph of it in which, after laying down the law, as he and the other Counsel advising Mr. Howland had supposed it to be, and referring to a decision of the late Chief Justice Richards, Mr. O'Brien proceeds as follows:

"You may naturally ask, why then was the decision the other way? This question I am unable to answer. The delivered judgment affords no answer. The arguments addressed were simply ignored, and the authority relied on by us, so far from being explained or distinguished, was not even referred to. This is eminently unsatisfactory to both the profession and the public—an officer of the Court overruling the judgment of a Chief Justice, who, above all others in our land, was skilled in matters of municipal law."

Now, in the first place, the judges of the Supreme Court call attention to a point almost, if not entirely, ignored in the judgments reversed, viz.: that the letter had no reference to facts or evidence, but to a dry question of law; and secondly, and this is of considerable general importance, they by no means agree that the letter went beyond the lines of legitimate criticism. The judge of first instance (Proudfoot, J.) says (11 O. R. 643) that it amounted "simply to a charge that Mr. Dalton was not a proper person to discharge the duties of his office. It not only affects this particular case, but who can tell how much it would diminish confidence among hundreds of suitors whose interests come before him weekly for consideration?" This, he says, was improper, at all events, coming as it did, from a solicitor who had acted for one of the parties in the *quo warranto* proceedings; and the prevailing judgment of the Court of Appeal appears to take the same view (14 A.R., at p. 189).

We are glad that, fortified by the judgments of the highest Court in the land, we can now say with confidence that it is open to anyone, whether a solicitor or

not, to criticize the deliverance of Judges, provided, of course, that the criticism is temperately worded, and is not made under such circumstances as to improperly influence a pending case.

In the present case it was held that the letter in question was in no sense a contempt of court, and that the criticisms contained therein were such as might properly be made.

This is what Mr. Justice Gwynne says with regard to it, and we quote his words as a complete vindication so far as any impropriety is concerned:

"This much may, I think, be said of the letter, that whether the reasoning, upon which the soundness of the learned Master's judgment was impugned, be sound or otherwise, and whether the authorities and references by which the writer essayed to support his argument, when properly understood, gave weight to his argument, or had the contrary effect, the whole tenor of the letter nevertheless appeared upon its face to be, as it was intended to be, an argument calling in question a judgment delivered upon purely legal grounds, and that on a motion to commit the writer of the letter as guilty of contempt of court upon any public grounds, as that the letter contained any calumnious interpretation of, or as a personal attack upon the integrity of the judge, or as having a tendency to bring him or his judgments into contempt with the public, there could not have been found, I think, in modern times at least, any precedent for entertaining such an application upon such grounds, upon like material; and certainly none of the authorities which were relied upon by the relator in the present case would have had any application in such a case." And the same learned judge also says: "Mr. O'Brien's letter, which stated his reasons for thinking the qualification to be good, and the Master's judgment to be erroneous, could in no conceivable manner prejudice the relator's case unless the matter of the letter could be construed to have a tendency to interfere with the due administration of justice in a Court of Appeal in the event of the Master's judgment being brought before such a Court, by appeal. A suggestion that it could have such a tendency as offering by implication a grave insult to that Court, would seem to partake of contempt of court, more than anything in the letter complained of, which, as a legal argument, appears to have been, in the opinion of the Court of Appeal for Ontario, exceedingly weak, defective, and inconclusive, but whether the argument be weak or strong the suggestion that this argument, stamped as it was with the infirmity that it expressed merely the legal opinion of the solicitor of the party against whose contention the judgment had been rendered, might have a tendency to taint, obstruct, or interfere with the due administration of justice in the Court of Appeal, in the event of the matter being brought before that court, is a preposterous proposition for which there is no foundation, and in my opinion it cannot be, and should not have been entertained:" and with him concurred Fournier, J., while Ritchie, C.J., and Strong and Taschereau, JJ., express no manner of dissent, but on the contrary, all agreed that the appeal should be allowed with costs.

As to the objection made on behalf of the respondent that this was an appeal on the subject of costs only, and with reference to the remark of the learned Chief Justice of the Court of Appeal on the argument that the whole matter

seemed to him of little moment being merely a question of costs, we may refer to the words of Mr. Justice Strong: "Then it is said that this is merely an appeal on a question of costs. This objection also appears to be wholly untenable. The proceeding to commit for contempt is of a penal and quasi-criminal character. The order complained of contains, in the first place, a distinct adjudication that the appellant has been guilty of a contempt of court, and it then proceeds (waiving other punishment) to inflict what is in substance, if not in form, a penalty or punishment by ordering the appellant to pay costs. The adjudication that the appellant, a solicitor and officer of the Court and moved against in that quality, has been guilty of a contempt is, by itself, an appealable judgment, and would have been so even if it had not (as in fact, however, it has) been followed by sentence. As Mr. Blake forcibly urged, the order under appeal affixes to the appellant as a professional man, a stigma from which he is entitled to be relieved if he has been found guilty upon insufficient evidence or for insufficient reasons. Again, by ordering him to pay costs as a consequence of this conviction, the Court inflicts upon the appellant a punishment which, if not so in name and form, is yet in substance and effect, a fine for his contempt. There can be no analogy between an appeal from such an order as this, and one from a decree or order in an ordinary case relating to property or private rights which is confined to an adjudication as to costs to be paid by one party or the other. The authorities to this effect are clear and entirely support what is said on this head in the judgment of Mr. Justice Burton in the Court below."

The same learned Judge also says in regard to the letter in question: "The letter certainly does allege that the learned Master had pronounced an erroneous decision, but it does not contain any imputation that such alleged error proceeded from any improper motive."

Their Lordships fully and freely concede that Judges are no more protected from fair criticism than other servants of the public, and that, as Mr. Justice Gwynne puts it, whether such and such a writing is a contempt of court or not "is an issue which for its determination calls for a judgment not rendered in the exercise of an arbitrary discretion of the Court to which the question of law is submitted, but rendered in accordance with the principles of law and justice equally as any other point of law in an action, suit, or judicial proceeding is submitted."

Let it not be supposed that this journal or its editor would so far depart from their past record as to wish to derogate in any way from the legitimate dignity of the Bench. It is, however, a melancholy fact that no body of men can, especially in a comparatively small community as ours still is, be trusted to exercise power over the persons or property of others, except under well-guarded rules of law, and subject to rights of appeal. Judges are no exception to this rule, and while we would, in a proper case, be their most ardent supporters in resisting improper strictures directed against them, especially if they were defending the position of the Bench against some powerful public journal, we think that in this case Mr. O'Brien may claim to have done a public service in not having dropped this matter until it was placed by the highest Court of the Dominion in a more satisfactory position than that in which it was left by our Provincial Courts.

In *Mitchell* v. *Commonwealth*, Kentucky Court of Appeals, March 12, 1889, it was held that a cellar under a dwelling-house, though entered only from the outside, is within the statute of burglary. The Court said: "The evidence shows that the property was taken out of a cellar under the dwelling-house, there being no internal communication between them. It was necessary to go out of the house into the yard to enter the cellar. The door to it opens out into the open air. It had no fastenings, but could not be opened without the use of force. It is therefore now urged that the cellar was no part of the dwelling-house, and that the accused, if guilty, is only so of a trespass and petit larceny. There is a diversity of decision as to what does and what does not in law constitute a part of a dwelling-house. Some cases include all within the curtailage, and this, according to Blackstone, appears to have been the common-law rule; while others are made to turn upon the use. It has been said that burglary may be committed by breaking into a dairy or laundry standing near enough to the dwelling-house to be used as appurtenant to it, or into such outbuildings as are necessary to it as a dwelling. *State* v. *Langford*, 1 Dev. 253. Also by breaking into a smoke-house opening into the yard of a dwelling-house and used for its ordinary purposes. And cases are to be found holding that if an outhouse be so near the dwelling proper that it is used with it as appurtenant to it, although not within the same inclosure even, yet burglary may be committed in it. *State* v. *Twitty*, 1 Hayw. (N.C.) 102. It need have no internal communication with the dwelling proper to give it this character. In *Rex* v. *Lithgo*, Russ. & R. 357, the breaking was into a warehouse. There was no internal communication between it and the dwelling of the owner, but they were contiguous, inclosed in the same yard and under the same roof, and it was held to be burglary. Mr. East says: "It is clear that any outhouse within the curtilage or same common fence as the mansion itself must be considered as parcel of the mansion. * * * If the outhouses be adjoining to the dwelling-house and occupied as parcel thereof, though there be no common inclosure or curtilage, they may still be considered as parts of the mansion." 2 East P. C. 493. It is difficult to lay down any general rule upon the subject, owing to the nice distinctions to be found in some of the cases. It seems to us, however, that both the use and the situation should be considered. Can the place which has been entered, considering both its situation and use, be fairly considered as appurtenant to and parcel of the dwelling-house, or as the older writers say "a parcel of the messuage"? If so, then burglary may be committed by breaking into it. The dwelling-house of a man has peculiar sanctity at common law. It is his castle. The law intends its protection, because it is the family abode. The object is to secure its peace and quiet, and therefore the burglar has always been liable to severe punishment. The law throws around it its protecting mantle, because it is the place of family repose. It is therefore proper, not only to secure the quiet and peace of the house in which they sleep, but also any and all outbuildings which are properly appurtenant thereto, and which, as one whole, contribute directly to the comfort and convenience of the place as a habitation.

If this reasoning be correct, then any which are not so situated, or are not so used, should not be regarded as a part of the dwelling, although they may in fact be within the curtilage. If there for other distinct purposes, as for instance, a store-house for the vending of goods or a shop for blacksmithing, and the dwelling is equally convenient and comfortable without them, and they are not in fact a part of it as by being under the same roof, so that the breaking into them will disturb the peace and quiet of the household, then they should not be regarded as a part of it in considering the crime of burglary or the offence named in the statute. *Armour* v. *State*, 3 Humph. 379. If, however, an outhouse, having no internal communication with the dwelling proper, may be considered as so appurtenant to it that burglary may be committed therein, surely it would seem it should be so held as to a cellar under the dwelling, although there may be no means of internal communication between them. It is under the same roof. It is a part of the house in which the occupant and his family sleep. It is essentially part and parcel of the habitation. It is manifest, however, that the statute above cited includes it. It says: 'Or shall feloniously break any dwelling-house, or any part thereof, or any outhouse belonging to or used with any dwelling-house.' The language is quite sweeping; and it is clear it was the legislative intention, in enacting it, to embrace not only every part of the dwelling but every outhouse properly a parcel of and appurtenant to it. It at once strikes the ordinary observer that it was not intended the cellar of adwelling-house should be excluded from its operation, and to so hold would not only be in the face of the language used but unreasonable.—*Albany Law Journal.*

COMMENTS ON CURRENT ENGLISH DECISIONS.

PRACTICE—DEATH OF ONE OF SEVERAL PLAINTIFFS BEFORE JUDGMENT—APPLICATION TO REVIVE AND CARRY ON ACTION AGAINST THE DEFENDANT.

Arnison v. *Smith*, 40 Chy.D. 567, was a curious application by the executors of one of several plaintiffs, who had died before judgment, to be allowed to carry on the action against the defendants, after judgment had been given in the action in favour of the surviving plaintiffs, who had proceeded without adding the representatives of their deceased co-plaintiff. The action was for damages, and each plaintiff had a separate cause of action. The Court of Appeal (Cotton, Lindley and Lopes, L.JJ.), affirming the decision of Kekewich, J., refused the application; Cotton, L.J., holding that the Court had no jurisdiction to make such an order after a final judgment; and Lindley and Lopes, L.JJ., thinking the order should not be made in the present case even if the Court had jurisdiction.

AGREEMENT TO REFER—STAYING PROCEEDINGS IN ACTION—C.L.P. ACT, 1854, S. 11—(R.S.O., C. 53, S. 38.)

In *Lyon* v. *Johnson*, 40 Chy.D. 579, Kay, J., held that although under the C.L.P. Act, s. 11 (R.S.O., c. 53, s. 38), the Court may, and should *prima facie*, restrain actions in respect of matters which the parties have agreed to refer to arbitration, yet that under that section the Court has a discretion which it is bound to exercise, and under the circumstances existing in this case he refused to grant the stay. The plaintiff and defendant were partners in the surgeons' and apothecaries' business, and the partnership articles provided that presents and gratuities from patients were to be regarded as partnership profits. A lady, who had been a patient of the firm, had died, leaving her residuary estate, amounting to £8,000, to one of the partners. The partner to whom the legacy was left claimed that this bequest was left as an act of private friendship and not in consequence of the testatrix being a patient, and was, therefore, not within the partnership articles; and the learned judge thought that was a question that could be more satisfactorily determined by the Court than by any arbitrator.

SETTLEMENT OF SETTLOR'S OWN PROPERTY—LIMITATION TO SETTLOR FOR LIFE, DETERMINABLE ON ALIENATION.

In re Detmold, Detmold v. *Detmold*, 40 Chy.D. 585, a settlor had settled his own property upon trust to pay the income to himself "during his life, or till he shall become bankrupt, or shall assign charge or incumber the said income, or shall do or suffer something whereby the same or some part thereof, would, through his act, default, or by operation or process of law, if belonging absolutely to him, become vested in or payable to some other person"; in which event there was a limitation over in favour of the settlor's wife. A creditor having obtained judgment against the settlor, subsequently obtained the appointment of a receiver of the income of the trust estate by way of equitable execution, and the settlor was thereafter adjudicated a bankrupt. A contest then arose between the wife on the one hand and the receiver and trustee in bankruptcy on the other hand, as to whether the limitation over in favour of the wife was valid. North, J., held that it was, and that the husband's interest was forfeited on the appointment of the receiver, and that the trustee in bankruptcy was bound by it because the forfeiture had taken effect before the bankruptcy commenced.

6 ANNE C. 18—CESTUI QUE VIE—EXECUTORY DEVISE.

In re Pople, 40 Chy.D. 589, is a case in which the procedure provided by 6 Anne, c. 18, was resorted to. The applicant was devisee of land in case of the death of another without having issue, and it was held in the first place that such a person is one having a claim in expectancy to an estate after the death of a person within the meaning of the Act. The devisee for life had married but deserted her husband, having had no issue. Abraham Fowler had previously purchased her interest. Orders were made under the statute in June and August, 1888, for Fowler to produce the tenant for life, first, at W. church door, and secondly, in Court. She was neither produced, nor proved to be alive. North, J., therefore ordered that she should be taken to be dead.

RESTRICTIVE COVENANTS AS TO USE OF LAND—ESTATE SOLD IN LOTS—MUTUAL COVENANTS BY PURCHASER WITH VENDOR AND PURCHASERS OF LOTS.

King v. *Dickeson*, 40 Chy.D. 596, was an action for an injunction to restrain the breach of restrictive covenants as to the use of land. An estate was sold in building lots; the purchasers of each lot entered into a covenant with the vendor and with the purchaser of the other lots not to build on his lot beyond a specified line. The purchaser of one lot mortgaged part of his lot. The mortgagee had notice of the covenant, but no restriction as to the use of the land was imposed on him by the mortgagor. The mortgagee, having foreclosed his mortgage, sold the mortgaged land, and it ultimately vested in the defendant, both the defendant and the sub-purchasers, through whom he claimed, buying with notice of the covenant. The action was brought by the mortgagor in respect of his ownership of the other part of the lot not included in the mortgage; but it was held by North, J., that although the purchasers of other lots would be entitled to prevent the defendant from building contrary to the covenant, yet that the mortgagor, having imposed no restriction on his mortgagee, could not compel its observance either by the mortgagee or any one claiming under him. The action was therefore dismissed.

VENDOR AND PURCHASER—SALE OF "BUSINESS PREMISES"—PROPERTY SUBJECT TO UNDISCLOSED RESTRICTIVE COVENANTS—DEFECT IN TITLE—RETURN OF DEPOSIT.

In re Davis & Cavey, 40 Chy.D. 601, was an application under the Vendors' and Purchasers' Act. The property in question was sold at auction, and described in the particulars as "leasehold business premises." The conditions of sale provided that the title should commence with the conveyance to the vendors and that no objection should be made to anything contained in the lease; but nothing was said about its contents, and no opportunity was given to intending purchasers to inspect the lease, and the property was bought by a purchaser who had not inspected it. After the sale the purchaser discovered that the lease contained covenants restricting him from carrying on upon the premises any trade or business, or doing any act to the nuisance or annoyance or damage of the lessors or the adjoining tenants, or using the premises as a public house. The question was whether, under these circumstances, the purchaser was bound to accept the title; and it was held by Stirling, J., he was not, because as the property was put up for sale as business premises the vendor was entitled to a title that would enable him to carry on any business, subject only to the restrictions imposed by the general law, or in force as to any particular trade; and that as the covenant in question imposed serious restrictions upon the use of the premises as business premises, he was entitled to a declaration that the title was not such as he could be compelled to accept; but the Court refused to order a return of the deposit, because the Court held that in such a case as the present the deposit could only be ordered to be returned if the contract was invalid; and that upon an application under the Act the validity of the contract could not be disputed. The order was, however, made without prejudice to an action for the deposit.

WILL—CONSTRUCTION—DIRECTION TO PAY DEBTS OUT OF RENTS, DIVIDENDS AND ANNUAL PROCEEDS, WHETHER IT AUTHORIZES PAYMENT OUT OF CORPUS—LEGACY, GENERAL, OR SPECIFIC.

In re Green, Baldock v. *Green*, 40 Chy.D. 610, two questions arose upon the construction of a will, whereby the testator had bequeathed to his wife, subject to the payment of his debts, all the cash in his house, and directed that in case such money should be insufficient the deficiency should be paid out of the rents, dividends and annual proceeds of all his estate. He also specifically bequeathed property to his wife for life, and appointed her his executrix. She paid the debts in part out of the corpus. The first question was whether the will authorized payment of the debts out of the corpus: and if not, whether the executrix could be compelled to recoup the corpus out of the income of her specifically bequeathed property. Stirling, J., held that the words "rents, dividends, and annual proceeds" meant the "annual rents, dividends. and proceeds," and did not authorize payment out of the corpus; but as the debts had, in fact, been partially paid out of the corpus, and the testator had not provided for such an event, the executrix could not be required to recoup the corpus out of the income of the property specifically bequeathed to her; because, notwithstanding the provision of the will, the creditors themselves had a right to resort to the corpus for payment. The other question was this: the testator bequeathed a public house in trust for sale, and out of the proceeds of such sale, and the rents and profits until sale, he gave a legacy to Elizabeth Dovey, and as to the residue of such proceeds, and rents, and profits, and all other, the residue of his real and personal estate, he gave the same to her two daughters; and the question was whether the gift of the residue of the public house was general or specific. The Court held it was not specific, but that the residue formed part of the residuary estate of the testator.

TRADE MARK—INFRINGEMENT—INJUNCTION.

The only other case in the Chancery Division which remains to be noticed is *Jay* v. *Ladler*, 40 Chy.D. 649, which was an action to restrain the infringement of the plaintiff's trade mark. The plaintiff carried on business as a furrier, under the name of the "International Fur Store," and used as a trade mark for his goods a picture of a lady and a bear. This device he had used as to all his goods, but had registered it as applied to mantles and coats. The defendant had sent out a circular to his customers on which was also the picture of a lady and a bear. This, Kekewich, J., held to be equivalent to advertising his goods as those of the plaintiff, and though it was not proved that any one was actually deceived, an injunction was granted restraining the defendant from using the mark, it being held that, independent of registration, the plaintiff had a common law right to the mark, which was not derogated from by its registration as applicable to a part only of the goods sold by him.

LESSOR AND LESSEE—RESTRICTIVE COVENANT—REPRESENTATIONS.

Turning now to the Appeal Cases the first to be noticed is *Spicer* v. *Martin*, 14 App. Cas. 12, which we noted when before the Court of Appeal (see *ante* vol.

23, p. 67. This was an action to restrain by injunction the breach of a restrictive covenant entered into by the plaintiff's lessor with his grantor, and on the faith of the existence of which the plaintiff had purchased his own lease and entered into a similar covenant. The property of the plaintiff was a private house, being one of six others which had been separately conveyed to the lessor subject to a restrictive covenant on his part against using them otherwise than as private residences. The plaintiff in negotiating for the purchase of a lease of one of them was informed of the existence of this covenant by the lessor, and also that the other houses had been leased to other tenants who had given similar covenants to the lessor, and the plaintiff was himself required to enter into a covenant to the like effect with the lessor, but there were no mutual covenants by the lessor or lessees of the other houses with the plaintiff. Some subsequent lessees, with the concurrence of the lessor, proposed to convert five of the houses into a hotel, and it was to restrain this being done that the action was brought. The Court of Appeal decreed the plaintiff entitled to relief, on the ground that the negotiations for the purchase of the plaintiff's house amounted to a collateral contractual obligation on the part of the lessor that the tenants of the other houses should be bound to use their houses as private dwellings only. The House of Lords, however, while affirming the decision, did so on the ground that the intention of the parties was that the plaintiff and the other lessees were to be protected by, and have the benefit of, the covenant entered into by their lessor with his grantors, and to be bound by a similar obligation to be entered into by each on his own behalf, and that it made no difference that each house had been conveyed to the lessor by a separate conveyance, and was subject to a separate restrictive covenant.

PRACTICE—COSTS—TRIAL WITH JURY—JURISDICTION OF JUDGE TO DEPRIVE PLAINTIFF OF COSTS—"GOOD CAUSE"—ORD. 65 R. 1—(ONT. RULE 1170.)

The vexed question as to the principle on which the judge at a trial may under Ord. 65 r 1 (Ont. Rule 1170.) deprive a successful plaintiff of costs, has at length reached the House of Lords in *Huxley* v. *The West London Extension Railway*, 14 App. Cas. 26. It may be remembered that the reversal by the Court of Appeal of a decision of Lord Coleridge, C.J., depriving a plaintiff of costs under that Rule in the case of *Jones* v. *Curling*, 13 Q.B.D. 262, roused the judicial ire of that learned judge, and we find that in the present case he at first refused to exercise his discretion as to costs, on the ground that the Court of Appeal in *Jones* v. *Curling* had made the principles on which such jurisdiction was to be exercised wholly unintelligible to him, and it was not until the case had been remitted to him by the Court of Appeal that he could be persuaded to exercise his jurisdiction. This he then did, and deprived the plaintiff of costs on the ground that he had claimed £300 and only recovered £50, and had preferred an extravagant and extortionate claim, and had supported it by fraudulent statements and dishonest acts, and had endeavoured to substantiate it before a jury by evidence which they properly disbelieved. An appeal from this decision was dismissed by the Court of Appeal. The plaintiff's appeal to the House of Lords

was based on the ground that Lord Coleridge, C.J., having refused to entertain jurisdiction on the question of costs, was *functus officio*, and had thereafter no jurisdiction to make the order when the cause was remitted to him by the Court of Appeal. That his refusal to entertain jurisdiction was in fact an order on the question of costs; and also that the grounds assigned by Lord Coleridge did not amount to "good cause" within the Rule. But the Lords were against the appellant on both grounds, holding that by his refusal to entertain jurisdiction on the first application Lord Coleridge was not thereby *functus officio;* and also that the grounds assigned constituted "good cause." With reference to *Jones* v. *Curling*, Lord Bramwell remarked that he shared Lord Coleridge's astonishment at the decision which so perturbed him. But Lord Fitzgerald said, "The principle on which that case is supposed to rest seems to be, that if there are no facts before the judge which would constitute 'good cause,' then the judge has no jurisdiction to interfere, and his order would be erroneous. So far I can can see no reason to dissent; I concur so far;" but whether in that particular case there was, or was not, "good cause," he declined to express an opinion. With the principle thus enunciated Lord Watson seems also to agree. In his opinion, without attempting a complete definition, "good cause" embraces, at all events, "everything for which the party is responsible, connected with the institution or conduct of the suit, and calculated to occasion unnecessary litigation and expense." After judgment had been delivered, a letter was handed to the Lord Chancellor from the plaintiff, asking permission to address their Lordships; but they refused to hear him, on the ground that his case had been fully argued as to the law, and it would not be regular to permit him to make an additional statement as to facts which could not be proved.

COLLISION—EXCEPTIONAL CURRENT—NEGLIGENCE.

City of Peking v. *The Compagnie Des Messageries*, 14 App. Cas. 40, was a case of collision. The appellant's vessel had in broad daylight run down the respondent's vessel at her moorings, and had been found by the Admiralty Court solely liable for the collision. Notwithstanding the fact that the accident was attributable to the effect of an exceptional current, known to be a possible though improbable contingency, yet inasmuch as it was shown that the anchors were not in readiness it was held that the appellants had neglected ordinary precautions and could not be absolved from blame.

B.N.A. ACT, S. 109—INDIAN RESERVATION—RELATIVE RIGHTS OF DOMINION AND PROVINCE.

The celebrated case of *St. Catharines* v. *The Queen*, 14 App. Cas. 46, was brought to determine the relative rights of the Dominion and the Province of Ontario in certain lands in Ontario, which at the time of Confederation formed an Indian Reservation, but in which the Indian title had subsequently been ceded to the Dominion Government by a treaty with the Indians, made in 1873. The judgment of the Judicial Committee of the Privy Council was delivered by Lord Watson, and the ground of the decision may be gathered from two extracts. "The Crown has all along had a present proprietary estate in the land upon

which the Indian title was a mere burden." The ceded territory was at the time of the union land vested in the Crown subject to "an interest other than that of the Province in the same," within the meaning of sect. 109 (of the B.N.A. Act) and must now belong to Ontario in terms of that clause." With regard to the effect of the treaty of cession in 1873, which it was claimed amounted to a conveyance of the Indian title to the Dominion Government, he says: "Even if its language had been more favourable to the argument of the Dominion upon this point, it is abundantly clear that the commissioners who represented Her Majesty, whilst they had full authority to accept a surrender to the Crown, had neither authority nor power to take away from Ontario the interest which had been assigned to that Province by the Imperial Statute of 1867." Whilst Ontario is declared entitled to the territory in question it has also to assume the liabilities incurred to the Indians as a consideration for the surrender of their interest.

MORTGAGE—PROVISO FOR REDEMPTION—CONSTRUCTION—CONVEYANCE, TERMS OF.

The short point decided by the Judicial Committee in *Plomley* v. *Felton*, 14 App. Cas. 61, was simply this, that when tenants in tail under a will joined in a mortgage, thereby barring the entail, but the proviso for redemption was that the reconveyance was to be made to the mortgagors respectively according to their "original respective estates and interests," the parties were entitled to a reconveyance of the estates as originally created by the will and not as altered for the purposes of the mortgage. The mortgaged estate had been sold and the contention arose between the parties claiming to be entitled to the surplus after payment of the mortgage; and the effect of their Lordships' decision is, that the surplus is subject to the limitations of the will, under which the mortgagors acquired their title.

LAW OF HONDURAS—MORTMAIN ACT, 9 GEO. 2, C. 36—INTRODUCTION OF ENGLISH LAW.

It is only necessary to notice *Jex* v. *McKinney*, 14 App. Cas. 77, for the fact that the Privy Council have approved and adopted the decision of the House of Lords in *Wicker* v. *Hume*, 7 H.L.C. 134, holding that on the true construction of the Act of the Colony of Honduras introducing English law, that while the Mortmain Act (9 Geo. 2. c. 36), was included in the description of laws thereby introduced, yet its provisions do not satisfy the prescribed condition of being applicable to the colony, and therefore it was not in force. A long train of decisions of our Courts have, however, held the contrary to be the case in Ontario (see *Lisscomb* v. *Whitby*, X Gr. 1).

Notes on Exchanges and Legal Scrap Book.

THE ENGLISH BENCH.—Field, J., has sent in his resignation; Manisty, J., will shortly do the same. We are sorry to hear Huddleston, B., cannot remain much longer; Pollock, B., and Denman, J., are known to contemplate retirement; the end of the Special Commission will probably see the elevation of Sir

James Hannen to the comparative ease of Law Lord in the Judicial Committee of the Privy Council. Rumor has long been busy about the retirement from judicial labors of the Master of the Rolls, and now there are similar rumors respecting Lindley and Bowen, JJ., as to the latter of which, however, we are exceedingly sceptical, as we have favorable accounts of this judge's health, and hope to see him again at his post in a couple of weeks. How *all* these vacancies are to be properly filled up is matter for anxiety, but peradventure, the Lord will provide.—*Pump Court.*

PROFESSIONAL INTEGRITY.—I am bold to urge upon young lawyers especially, the utmost scrupulousness in transmitting to clients money collected for them. Do not mix it with your money; do not use it as your own for a day or an hour; do not include it in your bank account; treat it as something to be handled by you with reluctance, and to be given to its owners without delay. Let the members of the Bar and the Court pursue with diligence and severity every lawyer who uses the money of his client and fails to pay it over. Let such a case never be treated as one of debtor and creditor, but as one of embezzlement to be punished criminally. . . . Nothing can be done more effectually to strengthen the character and increase the emoluments of lawyers than to demonstrate that extreme strictness and entire fidelity prevail in the profession concerning moneys collected for others by its members. Equal strictness should be exercised by lawyers when they act as trustees. As a result of the increasing wealth of this country, to which I have before referred, large sums of money of others necessarily come often into the possession of lawyers, and lawyers are frequently made the trustees of estates. . . . The whole community should rise up in condemnation and in punishment of the embezzlers of trust moneys; and the lawyers of the country should take the lead in so strengthening the laws that swift and sure punishment will reach such criminals, and they should particularly establish the fact that to lawyers trust funds can most safely be committed, because the quickest and fullest retribution will follow the lawyer who unlawfully meddles with the money of any person whose means of living depend upon his fidelity as trustee.—*American Law Journal.*

IMPORTANT TO ODDFELLOWS.—The following decision of the English Court of Chancery is of interest to members of other benevolent and provident societies as well as to the members of the society more immediately concerned:—An important question between the Independent Order of Oddfellows, Manchester Unity, as a body, and one of the lodges, the Local Prosperity Lodge, No. 52, of the Haslingden District Independent Order of Oddfellows, Manchester Unity, was recently argued and settled in the Chancery Court of Lancashire. The officials of the Order considered that the lodge had committed a breach of trust and confidence in that they, contrary to the rules of the Order, and without the knowledge and consent of the plaintiffs, and without application to them, had wrongfully appropriated and divided part of the funds of the lodge among themselves and the members,

and which amount should go to the general sick and funeral fund. A declaration was therefore claimed that the appropriation was a breach of trust, and that defendants were personally liable to make good the sum so divided, and as against the defendants, an order for repayment, an injunction of restraint, and an order for payment of costs were desired; for it appeared from the rules that the whole of the objects and rules of the lodge should be subject to the provisions of the general and district rules, and that lodges desirous of appropriating surplus capital must make application to the Grand Master and Board of Directors in manner laid down, and the directors should be authorized to allow appropriation of surplus capital on certain conditions, one of which was that in the event of a lodge at any time making a division of its funds contrary to the provisions, the amount so divided should be forfeited to the sick and funeral fund, and the trustees allowing such distribution or any member receiving any portion thereof should be held personally responsible for the amount so misappropriated. The counsel for the plaintiffs pressed for the full relief desired as a warning to other lodges not to take similar steps. The Vice-Chancellor referred to a similar case, *Schofield* v. *Vause*, where he was not asked to order payment of money, but to restrain in view of a further breach. Counsel for the plaintiffs, however, said that case was merely on so much of the rules as related to the secession of a lodge. He then referred to another case, *Cox* v. *James*, tried before Mr. Justice Chitty in February, 1882, brought by two directors of the Manchester Unity of Oddfellows against the trustees of the Strangers' Refuge Lodge to make them liable jointly and severally to pay a sum which had been divided amongst the members of the lodge contrary to the general rules of the society, and Mr. Justice Chitty made the order desired. The counsel for the defendants, whilst agreeing to an order, pleaded that no order should be made as to costs, as his clients had acted in ignorance of the rules of the Order. As to the case of *Cox* v. *James*, he said there the trustees had notice that they were not to divide the fund, but here the defendants had received no such notice. The Vice-Chancellor took the same view as Mr. Justice Chitty in *Cox* v. *James*. Referring to the plea of ignorance of the defendants, he said if there was any ignorance which should not be excused it was ignorance of the law on the part of trustees acting for a constituent body of men probably very little able to protect themselves, and therefore requiring the protection of trustees, who, as a rule, were persons of higher position than the people of whom they were representatives.—*Law Journal.*

LAWYERS IN CONGRESS.—Mr. Frank Gaylord Cook, in an article in the May *Atlantic*, entitled "The Lawyer in National Politics," gives interesting statistics showing the great preponderance of lawyers in the Federal councils from the earliest days of the nation. Of the signers of the Declaration twenty-five of the fifty-five were lawyers, and of the committee charged with drafting it all but Franklin were lawyers. The convention of 1787 "was practically an assembly of lawyers," and the wisest that ever sat—thirty-four of the fifty-five members were lawyers. In the cabinets, six of the nine in Washington's were lawyers; five of eight in Adams'; six of ten in Jefferson's; eight of fourteen in Madison's;

all but one in Monroe's; all in John Quincy Adams'. Since John Quincy Adams every secretary of state has been trained for the Bar. Of the thirty-six secretaries of the treasury all but four have studied law. Of thirty-five postmaster-generals all but eight have received a legal training. Twenty-seven, nearly two-thirds, of the secretaries of war, and eight of the secretaries of the navy, have been educated to the Bar, and while the former post has been occupied by eight army officers, only one of the latter officials was ever at sea. In the first Senate seventeen of twenty-nine were lawyers, and half the House. In the twentieth House four-fifths had studied law, In the thirtieth, three-fourths of the Senate and three-fourths of the whole Congress were lawyers; in the fiftieth, four-fifths of the senators and two-thirds of the whole number; in the fortieth, forty-nine senators and one hundred and fifty-four representatives had studied law. After Washington none but lawyers occupied the presidency until Harrison, and since, all but Taylor, Johnson, and Grant have been lawyers. All but four of the twenty-two vice-presidents have been lawyers. Mr. Cook also shows that in the earliest days most of the lawyers were men of liberal education, culture and travel, but of the presidents and vice-presidents only about half have been college graduates. He also shows that few of the secretaries of state have had any experience in diplomacy, and few of the secretaries of the treasury have had any experience in finance. There has been an increasing proportion of self-educated men in the later Congresses. He concludes: "There are signs that this virtual monopoly in national politics is gradually disappearing. The unprecedented development of science and industry during the past fifty years has caused the growth of special departments of law, offering extraordinary rewards for their practice, and thus lessening the attractiveness of politics. Often the adoption of a legal specialty opens the way, not to the Senate of the United States, but to the management of a vast corporation and to the possession of great wealth. Sometimes these objects are reconciled, and the Senate, as before, becomes the ultimate goal. In fact, wealth has long since asserted herself by the side of legal knowledge as the nurse of statesmen, and the millionaire sits with the lawyer in the halls of Congress. . . . Nevertheless the lawyer must retain an important influence in national affairs; and that influence when properly exerted is a great conservative force. As DeTocqueville has well pointed out, a large part of political questions in the United States are passed upon sooner or later by the legal profession; and the habit of consulting precedent begets 'the stationary spirit of legal men and their prejudices in favour of existing institutions.' It fell mainly to them to constitute and establish the government of the United States. Guided by that spirit they have adjusted the political experience of the Anglo-Saxon race to the modified conditions of a new world, and the excellence of their work will ever deserve a grateful recognition."

DISCHARGE OF SURETY.—The important case of *The Mayor and Corporation of Durham* v. *Fowler*, reported recently in the *Law Times* and in this month's number of the *Law Journal*, possesses additional interest in this country by reason of its bearing on the Irish cases of *Madden* v. *McMullen* and *Lawder* v.

Lawder, and more particularly in reference to the point upon which the latter decision was distinguished, and was now held by the English Queen's Bench Division rightly distinguishable, from *Phillips* v. *Foxall* and *Sanderson* v. *Aston*. It appears that the plaintiffs, the Town Council of a Borough, acting under the Municipal Corporations Act, 1882, appointed a collector for their borough rate, for whom the defendants became sureties. A condition of the bond was that the collector should pay to the treasurer of the borough all sums of money received by him as soon as the same should be received. The plaintiffs also appointed the same person collector for their district rate, for whom the defendants also became sureties. A condition of the bond was that the collector was to pay over to the borough treasurer the moneys collected by him within a week of their collection. The plaintiffs levied a borough rate, and in the precepts to the overseers, in addition to naming the amount of the contribution required from each parish, they stated the amount in the pound of the rate. The collector did not pay over the proceeds in respect of the borough rate as soon as he received them. The collector also, in respect of the amounts collected under the district rate, had not for many years previously to the execution of the bond paid over, and for some years after did not pay over, to the borough treasurer the proceeds of the rate within seven days of their collection by him. The plaintiffs acquiesced in these irregularities. Subsequently, the collector made default in paying over the amounts collected by him in respect of both rates, and was convicted of embezzlement in respect of the same, and the plaintiffs sued the defendants on their bonds. On this state of facts, several grounds of defence were put forward, but, passing over minor ones, we shall refer only to the main contention relied upon on behalf of the defendants, that they were discharged by reason of the systematic neglect of several of the leading conditions of both bonds, acquiesced in by the obligees from the date of the bonds respectively, and continued down to the discovery of the defalcations that led to the institution of the litigation. Now, mere *laches* of the obligee, or a mere passive acquiescence on his part in acts which are contrary to the conditions of a bond, is not of itself sufficient to relieve the sureties from liability; and as in effect the jury had found merely such "passive acquiescence" in what the collector, Goundry, did, the defendants had finally to base their defence on the contention that there was evidence from which the jury might not unreasonably have inferred that the corporation had, within the language of the leading authority, *MacTaggart* v. *Watson* (10 Bligh, 618, 3 Cl. & F. 525), "either by their conduct prevented the things from being done, or connived at their omission, or enabled the person to do what he ought not to have done, or leave undone what he ought to have done," but for which conduct the omission or commission would not have happened. And this question resolved itself, on the facts, into one as to whether the plaintiffs had connived at the departure from the conditions of the bonds in a sense amounting to more than "mere passive inactivity," such as the jury had found in substance. As to what would amount to evidence of such connivance, the judgment of the Court (delivered by Denman, J.) discussed and considered very closely the subsequent cases, *inter alia*, of *Dawson* v. *Lawes*, *Black* v. *The Ottoman Bank*, *Madden* v. *McMullen*, *Railton* v. *Mathews*, *Phillips* v. *Foxall*, and *Sanderson* v. *Aston*.

In *Phillips* v. *Foxall* (L. R. 7 Q. B. 666) it was held that a surety was discharged when an obligee continued the party, whose honesty was guaranteed, in his service after knowledge of his dishonesty, without communication of the discovery of his dishonesty to the surety; while in *Sanderson* v. *Aston* (L. R. 8 Ex. 73) it was held that a plea stating that the obligee of a bond who has continued in his service a clerk and traveller who had failed to pay over sums received by him, contrary to the condition of the bond that he should well and satisfactorily account for and pay over to the plaintiff all sums received for the plaintiff's use, and that the plaintiff, though well knowing the said defaults, wholly omitted and neglected to inform the defendants thereof, and continued to employ the clerk in his service, was a good plea to an action on the bond for the breaches subsequent to the time when the plaintiff knew of the previous defaults. *Sanderson* v. *Aston*, however, was so decided upon the supposed authority of *Phillips* v. *Foxall*, but certainly goes much beyond what that authority would justify, and the Court now found it impossible to reconcile the decision in *Sanderson* v. *Aston* with the cases already cited. "But," added Denman, J., "even assuming it to be a binding authority on an undistinguishable state of facts, we think that it is not an authority that in the present case there was evidence for the jury of such a defence as that which was held to be valid in that case. It was a decision only on demurrer, and decides only that the plea stated facts of non-payments which were *prima facie* a breach of duty which would have entitled the obligee to discharge the person employed. It by no means follows that if all the facts of that case had been set out there would upon the whole matter have been any case for the jury in support of the defence in question. Even if the cases of *Phillips* v. *Foxall* and *Sanderson* v. *Aston* were applicable in other respects, we think that they are distinguishable in principle from the present case on a ground upon which the Court of Common Pleas in Ireland held the surety liable in the case of *Lawder* v. *Lawder and others*. That was an action on a bond given to the plaintiff, a county treasurer, by a high constable as barony cess collector. The defaults consisted of lodging moneys in his own bank instead of the county bank, and retaining in his hands more than £100 at a time, in violation of the conditions of the bond. The Court held that, though *Phillips* v. *Foxall* would have applied if the plaintiff had been a private individual, the sureties were liable because the treasurer merely sued in his official capacity, and no personal equity could be set up against him. It was no doubt there said: 'He does not appoint the high constable; he cannot dismiss him. *Phillips* v. *Foxall* and all such cases are grounded on privity existing between the plaintiff and defendant.' Still we think that where the parties taking the bond are mere trustees for ratepayers, as the corporation here were, and the collector also a person who owed a duty to the ratepayers, the sureties who had guaranteed the proper discharge of his duties have no right to shelter themselves under the neglect of its duty by the corporation in not insisting on the fulfilment of the very conditions of the bond to which they are parties. The corporation may themselves be looked upon 'as public officers' as much as was the treasurer in *Lawder* v. *Lawder and others*." And in the result it was held, accordingly, that the defendants were not discharged from their liability as sureties.—*Irish Law Times.*

DIARY FOR JUNE.

2. Sun. .....*First Sunday after Ascension.*
4. Tue.....Maritime Court sits. Lord Eldon born 1751.
8. Sat.....Easter Term and High Court Justice sittings end. Last day for call notices for Trinity Term.
9. Sun.....*Whitsunday.*
10. Mon.....County Court Sittings for motions in York end.
11. Tue.....General Sessions and County Court Sittings for Trial except in York. St. Barnabas. Lord Stanley, Governor-General, 1888.
15. Sat.....County Court Sittings for motions in York end. Magna Charta signed 1216. Emperor Frederick of Germany died 1888.
16. Sun.....*Trinity Sunday.*
18. Tue.....Battle of Waterloo, 1815.
19. Wed.....Battle of Blenheim, 1704.
20. Thur.....Accession of Queen Victoria, 1837.
21. Fri.....Longest day.
22. Sat.....Slavery declared contrary to the law of England, 1772.
23. Sun.....*First Sunday after Trinity.*
24. Mon.....Midsummer Day.
25. Tue.....Sir M. C. Cameron died 1887.
28. Fri..... Coronation of Queen Victoria, 1838.
29. Sat.....St. Peter.
30. Sun.....*Second Sunday after Trinity.*

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

DUBUC *v.* KIDSTON, *et al.*

Hypothecary action—Judgment in—Art. 2075 C. C.—Service of judgment—Art. 476 C.C.P., and Con. Stat. L. C. Ch. 49, sect. 15—Waiver.

By a judgment *en declaration d'hypotheque*, certain property in the possession and ownership of respondents was declared hypothecated in favor of the appellant in the sum of $5,200 and interest and costs, and they were condemned to surrender the same in order that it might be judicially sold to satisfy the judgment, unless they chose rather and preferred to pay to appellant the amount of the judgment. By the judgment it was also decreed that the option should be made within forty days of the service to be made upon them of the judgment and in default of their so doing within the said delay that the respondents be condemned to pay to the appellant the amount of the judgment.

This judgment (the respondents residing in Scotland and having no domicile in Canada) was served at the prothonotary's office and on the respondents' attorneys. After the delay of forty days, no choice or option having been made, the appellant caused a writ of *fi. fa. de terris* to issue against the respondents for the full amount of the judgment. The sheriff first seized the property hypothecated, sold it, and handed over the proceeds to a prior mortgagee. Another writ of *fi. fa. de terris* was then issued, and another reality belonging to the respondents was seized. To this second seizure the respondents filed an opposition *afin d'annuler*, claiming that the judgment had not been served on them, and that they were not personally liable for the debt due to appellant.

Held, 1st, reversing the judgment of the Court below, that it is not necessary to serve a judgment *en declaration d'hypotheque* on a defendant who is absent from the province and has no domicile therein. Art. 476, C.P.C., and Con. Stat. L.C., c. 49, sect. 15.

2nd, That the respondents by not opposing the first seizure of their property, had waived any irregularity (if any) as to the service of the judgment.

3rd, That in an action *en declaration d'hypotheque*, the defendant, in default of his surrendering within the period fixed by the Court, may be personally condemned to pay the full amount of the plaintiff's claim. Art. 2075 C. C.

Appeal allowed with costs.

Blanchet, Q.C., for appellant.

Irvine, Q.C., for respondents.

THE UNION BANK OF LOWER CANADA. *v.* THE HOCHELAGA BANK.

Hypothec to the prejudice of creditors—When invalid—Art. 2023 C. C.

Where an hypothec has been acquired upon property within thirty days immediately preceding the declaration and admission of the mortgagee's agent, that the mortgagors were notoriously insolvent and *en deconfiture*, such hypothec in a report of distribution of the moneys realized on the property of the insolvents cannot be invoked to the prejudice of a party who was a creditor at the time when the hypothec was given. Art. 2023 C. C.

Appeal dismissed with costs.

Irvine, Q.C., for appellants.

Beique for respondent.

G. DEMERS *v.* N. DUHAIME.

Action en restitution de deniers—Sale of personal rights without warranty—Sale en bloc Arts. 1510 and 1517 and 1518 C. C.

N. D., respondent, owner of a cheese factory made an agreement with farmers by which the latter agreed to give the milk of their cows to no other cheese factory than to that of N. D. N. D. subsequently sold to G. D. (the appel-

lant) the factory and *sous la simple garantie de ses faits et promesses*, whatever rights he might have under his agreement with the farmers, for the bulk sum of $7,000.

Then G. D. assigned to B. the factory and the same rights, but excluding warranty, *sans garantie aucune*, for $7,500.

A company was subsequently formed, to whom B. assigned the factory and the rights, and one of the farmers to the original agreement having sold milk to another cheese factory, the company sued him, but the action was dismissed on the ground that N. D. could not validly assign personal rights he had against the farmers. Thereupon G. D. brought an action against N. D. to recover the price paid by him for rights which he had no right to assign. At the trial it was proved that although the price mentioned in the deed, and paid, was a bulk sum for the factory and the rights, the parties at the time valued the rights under the agreement with the farmers at $5,000. G. D. also admitted that the action was taken for the benefit of the present owners of the factory.

Held, affirming the judgment of the Court below (STRONG and FOURNIER, JJ., dissenting), that, inasmuch as the appellant, by the sale he had made to B., had received full benefit of all that he had bought from respondent and had no interest in the suit, he could not claim to be reimbursed a portion of the price paid.

Per TASCHEREAU, J.—If any action be laid at all, it could only have been to set the sale aside, the parties being restored to the *status quo ante* if it were maintained.

Appeal dismissed with costs.

Irvine, Q.C., for appellant.

Casgrain, Q.C., for respondent.

WEIR *v.* CLAUDE.

Pollution of running stream—Long-established industry—Nuisance—Injunction.

W. acquired a lot adjoining a small stream at Cote des Neiges, Montreal, and finding the water polluted from certain noxious substances thrown into the stream, brought an action in damages against C., the owner of a tannery situated fifteen arpents higher up the stream, and asked for an injunction. At the trial it was proved that C. and his predecessors from time immemorial carried on the business of tanning leather there, using the waters of the stream, and that it was the principal industry of the village; that the stream was also used as a drain by the other proprietors of the land adjoining the stream and manure and filthy matter were thrown in, and that every precaution was taken by C to prevent any solid matter from falling into the creek, and that W.'s property had not depreciated in value by the use C. made of the stream.

Held, affirming the judgment of the Court below, that, as between neighbors there are other obligations than those created by servitudes, which must be determined according to the quality of the locality, the extent of the inconvenience, and also according to existing usages; under the circumstances proved in this case, W. was not entitled to an injunction to restrain C. from using the stream as he did.

Appeal dismissed with costs.

Rielle & Lafleur for appellant.

Laflamme, Q.C., for respondent.

MITCHELL *v.* MITCHELL.

Removal of executor—Arts. 282, 285, 917, C.C.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (Appeal side), that Art. 282, C.C., does not apply to executors chosen by the testator, and that in an action for the removal of one executor, when there are several executors, the existence of a law suit between such executor and the estate he represents, and the evidence of irregularities in his administration, but not exhibiting any incapacity or dishonesty, are not a sufficient cause for his removal. Arts. 917—285, C. C. (STRONG, J., dissenting.)

Appeal dismissed with costs.

Rielle for appellant.

DeLisle for respondent.

LES ECCLESIASTIQUES DU SEMINAIRE DE ST. SULPICE *v.* THE CITY OF MONTREAL.

Municipal taxes—Special assessments—Exemption—41 Vict. (Q.), c. 6, s. 26—Educational Institution—Tax.

By 41 Vict., c. 6, sect. 26, all educational houses or establishments, which do not receive any subvention from the corporation or municipality in which they are situated, are exempt from municipal and school assessments; "whatever may be the act, in virtue of which such assessments are imposed and notwithstanding all dispositions to the contrary."

Held, reversing the judgment of the Court of Queen's Bench (Appeal side), Lower Canada, that the exemption from municipal taxes enjoyed by educational establishments under said 41 Vict., c. 6, sect. 26, extends to taxes imposed for special purposes, *e. g.*, the construction of a drain in front of their property. (SIR W. J. RITCHIE, C.J., dissenting.)

Per STRONG, J., every contribution to a public purpose imposed by superior authority is a 'tax" and nothing less.

Appeal allowed with costs.

Geoffrion, Q.C., for appellants.

Ethier for respondents.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[May 14.

CANADIAN LOCOMOTIVE COMPANY *v.* COPELAND.

Bill of lading—Rate of freight—Demand of freight at too high a rate—Refusal of consignees to accept cargo—Sale of cargo by master of vessel—Expenses of sale—Damages—Demurrage.

This was an appeal by the plaintiffs from the judgment of the Queen's Bench Division (reported 14 O.R. 170) and came on to be heard before this court (HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, J.J.A.) on the 28th and 29th days of January, 1889.

The court (HAGARTY, C.J.O., dissenting) allowed the appeal with costs; agreeing with the court below that freight was payable only at the reduced rate, but holding that it was the duty of the defendants to tender the coal to the plaintiffs with a demand for payment of freight at the reduced rate, and that not having done so the sale was unauthorized, and the expenses in connection therewith could not be charged against the plaintiffs.

The court also held that for the same reason the allowance of damages in the nature of demurrage could not be sustained, but that the defendants were entitled to some compensation (fixed at $100) for the delay of the plaintiffs in unloading the vessel, after the duty of unloading was actually undertaken by them.

Britton, Q.C., and *Rogers*, for the appellants.

W. Cassels, Q.C., and *A. W. Aytoun-Finlay*, for the respondents.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

ROSE J.] [June 1.

IN *re* MCCALLUM AND BOARD OF PUBLIC SCHOOL TRUSTEES OF SECT. 6, TP. BRANT.

School law—Public school—Suspension of pupil — Mandamus to trustees — Discretion—Delay—Change of position.

A pupil at a public school having injured the top of a school desk by cutting it, he was ordered by the schoolmaster to replace the top, and was suspended until he should do so. The suspension was on the 20th February, 1888, and on the 7th of May, 1889, notice of motion was served by the father of the pupil for a mandamus to compel the trustees to re-admit the son. In the meantime appeals had been made by the father to three of the trustees, to the Public School Board, and to the annual school meeting, on all of which applications the action of the teacher was sustained. During this time the pupil attended another public school.

Held, that the discretion exercised by the master and trustees should not be interfered with, especially after the delay and change in the position of affairs.

W. H. Blake for the applicant.

Aylesworth for the trustees.

Chancery Division.

BOYD, C. [May 22.

Re HEWISH.

Conveyancing Act, 1886—Sale by the Court, R. S.O., 1887, c. 44, s. 53, subs. 10—Mortgage—Bar o dower—Equitable dower.

In certain partition and sale proceedings wherein lands were sold and a vesting order made, but whereto the wives of certain persons entitled as tenants in common were not made parties,

Held, that the title of those claiming under the vesting order was defective, and the Convey-

ancing Act, R.S.O., 1887, c. 44, s. 53, subs. 10, did not cure the defect.

Where at the time of the vesting order the interests of two of the tenants in common were outstanding on mortgages, in which their wives had joined to bar dower,

Held, that the mortgages having been discharged out of the purchase money, the wives would be entitled to dower on the death of their husbands, notwithstanding the sale and vesting order.

E. D. Armour and *Hall* for vendor.

J. H. Macdonald, Q.C., for purchaser.

Practice.

Mr. DALTON.] [April 20.
GALT, C. J.] [May 13.

CLARKE *v.* CREIGHTON.

Irregularity—No indulgence to plaintiff where action not sustainable—Action for damages for false testimony.

The plaintiff sued for damages for false testimony, alleging that he had failed in a prior action by reason of such testimony given therein by the present defendant.

Held, that the action would not lie, and the plaintiff being in default by reason of not having given notice of trial, the action was dismissed.

S. R. Clarke, plaintiff in person.

C. Millar for defendant.

COURT OF APPEAL.] [May 14.

FOSTER *v.* VIEGEL.

Costs—Counter-claim—Scale of costs.

Where the defendant recovers on a counter-claim, the costs should be on the scale of the Court in which the action was brought by the plaintiff.

Irvine v. *Brown*, 12 P. R., 639, and *Amon* v. *Bobbett*, 22 Q. B. D., 543, referred to.

Aylesworth for the appellant.

Lash, Q.C., for the respondent.

FERGUSON, J.] [May 13, 14.

MCNEILL *v.* HAINES.

Costs—Scale of—Action for cutting timber on land—Title to land—R. S. O., c. 47, s. 18.

The plaintiff sued for damages sustained by the defendant cutting timber on his own land, after having sold such timber standing, to the plaintiff's assignor. It was determined by the Court that the timber sold was an interest in land.

Held, that the title to land was brought in question in the action, and therefore, although the plaintiff recovered only $135, a County Court would have no jurisdiction, and the costs should be on the scale of the High Court.

W. M. Douglas for plaintiff.

Lount, Q.C., for defendant.

ROSE J.] June 7.

SMITH *v.* WILLIAMSON.

Costs—Action of ejectment by administrator.

A trustee or executor stands in the same position as any other litigant with respect to costs.

And where an action of ejectment was brought by the administrator of a deceased person in whom the legal estate in certain land was vested, and by the hold of a mortgage created by the deceased person upon such land, and it appeared that the deceased purchased the land with the moneys of the defendant, and took the conveyance in his own name, and that the defendant was the true owner of the land,

Held, that the fact that there was no declaration of trust in favor of the defendant, and that the evidence in the hands of the administrator tended to show that the deceased was in his lifetime owner and not trustee, did not relieve the administrator from liability for costs; and costs were given to the defendant against both plaintiffs.

W. N. Miller, Q.C., for the plaintiffs.

Rae for the defendant.

ROSE, J.] [June 7.

MARKLE *v.* ROSS.

Masters and referees—Appeals from interlocutory rulings—G. O. Chy. 642—Rules 39, 846, 848-850—Judge in Chambers—Mortgage action—Plea of payment—Onus of proof.

G. O. Chy. 642 provided for an appeal to a Judge in Chambers against any decree, order, report, or other determination of any Master; but this order has been abrogated, and the provisions for appeals from Masters and Referees are now contained in Rules 848-850, in which there is no provision for an appeal from a ruling or certificate, but from a report only.

Held, nevertheless, that a party to any reference has a right to come to the court at any

stage with any well-founded complaint against the conduct of the referee, either personal misconduct or error in receiving or rejecting evidence, or otherwise; and Rule 39 shows the intention to permit interlocutory rulings to be considered; but a Judge in Chambers has no longer any jurisdiction, and the appeal must be made to a Judge in Court.

Conmee v. *Canadian Pacific R. W. Co.*, 16 O. R. at pp. 641, 642, and cases cited at p. 657, referred to.

Quære, whether upon a reference to a local Master, *qua* Master, an appeal from an interlocutory order would lie under Rule 846.

The action was brought to recover the principal and interest due upon a mortgage, and also upon certain other claims. The interest was alleged to be overdue, and the principal to have become due by virtue of an acceleration clause. The defendant pleaded payment of the interest. A reference was directed to a Master, and upon such reference the plaintiff proved his mortgage and it appeared therein that certain instalments of interest were overdue.

Held, that the plaintiff had made out a *prima acie* case, and could not be called in to prove the non-payment of the interest.

Aylesworth for the plaintiff.

F. E. Hodgins for the defendant.

STREET, J.] [June 11.

WHITNEY *v.* STARK.

Notice of trial—Irregularity—Laches in moving against—Waiver—No power to order short notice.

The ten days prescribed by Rule 661 for giving notice of trial cannot be shortened except by consent, or when short notice of trial is imposed as a term in granting an indulgence.

The plaintiff on the 23rd of May, when the proceedings were not closed, gave notice of trial for a sittings beginning on the 10th June. The pleadings were closed on the 27th May, and notice of trial might then and up to the 31st May have been regularly given in good time for the 10th June. The defendant waited until the 5th June, and then moved to set aside the notice of trial given on the 23rd May as irregular.

Held, that the defendant had waived the irregularity by his laches.

J. F. Gregory for the plaintiff.

R. U. Macpherson for the defendant.

Mr. DALTON.] [June 11

BADGEROW *v.* GRAND TRUNK R. W. CO.

Discovery—Examination of officer of company—Failure to attend—Motion to strike out company's defence.

There is no power to strike out the statement of defence of an incorporated company for the default of an officer of such company to attend for examination for discovery.

J. W. McCullough for plaintiff.

Aylesworth for defendants.

Chy. Div'l Ct.] [June 12.

MOSES *v.* MOSES.

Costs—Scale of—Jurisdiction of Division Court—Ascertainment of amount.

The decision of Robertson, J., 13 P.R. 12, as to the scale upon which the costs of this action should be taxed was affirmed by a Divisional Court on appeal.

Wallace Nesbitt for appeal.

Aylesworth contra.

Law Students' Department.

The following papers were set at the Law Society Examination before Easter Term, 1889:

SECOND INTERMEDIATE.

REAL PROPERTY.

1. What is the difference between right of property and right of possession?

2. What is the effect of a tenant's denial of his landlord's title in ejectment?

3. What are the different ways in which a release operates?

4. A. died intestate, leaving a widow, two children, and a child of a deceased child surviving him. How did his land descend under the statute of Victoria?

5. What is an estate upon condition? Give instances of conditions precedent and subsequent, and state their effect upon the estates to which they are annexed.

6. What are the chief points of difference between a tenancy in common and a joint tenancy?

7. A tenant enters under a lease for five years, which is not under seal, and pays rent quarterly according to the terms of the writing. What interest has he?

BROOM'S COMMON LAW AND O'SULLIVAN'S GOVERNMENT IN CANADA.

1. Explain the writ of *prohibition*, and state in what cases it lies.

2. What facts are necessary to constitute *false imprisonment?*

3. When will a *master* have a right of action for an injury done to his *servant?*

4. What is meant by *certiorari*, and for what purpose is it employed?

5. Upon what is the action of *trespass to land founded*, and what facts must be proved in order to establish a *prima facie* case?

6. State briefly the law as to the necessity for proof of *malice* in an action of slander.

7. Enumerate the different constitutional changes which have taken place in this province since the conquest of Canada by England.

PERSONAL PROPERTY—JUDICATURE ACT AND RULES.

1. Specify the main points by which personal property is distinguished from real.

2. How far is a grant of all the fruit which may hereafter grow on a man's land good? Why?

3. "Choses in possession has long been liable to involuntary alienation for the payment of the debts of their owner." Explain fully.

4. A. is surety for B. to C. to secure B.'s liability to C. on a bond from B. to C. A. has to pay the amount of the bond. What can A. claim from C.? Why?

5. A. owes B. $500, and takes B.'s promissory note for $400 in settlement of claim. He afterwards contends that he is not bound to give a quittance, the note being for a smaller amount than the debt. Is he right? Why?

6. At what stage in an action can you obtain an examination of a party for discovery?

7. How is a judgment for the recovery of land enforced?

EQUITY.

1. Explain and exemplify the maxim that "Equity acts *in personam.*"

2. State the rules which govern (according to Snell) in deciding whether a sum mentioned in an agreement to be paid for a breach is to be treated as a penalty or as liquidated and ascertained damages.

3. A. enters into a contract with B. for the purchase of Black Acre, but refuses to carry it out alleging misrepresentation. What facts must he prove in order to succeed?

4. What are the enactments of the Statute of Frauds in regard to trusts?

5. In what respects are charities more favored in law than individuals, and in what less favored?

6 A. who is trustee under the will of B. gives to his solicitor instructions to look out for an investment for some of the trust funds. The solicitor tells him he can recommend a mortgage of $5000 on a farm in the Township of York, stating there was ample margin. The investment is made, and ultimately the farm has to be sold under the mortgage at a loss. What is the position of the trustee?

7. What is meant by the doctrine of Cy-pres? Exemplify.

SECOND INTERMEDIATE HONORS.

REAL PROPERTY.

1. Can a conveyance be drawn to a man so that dower will not attach? If not, can you draw a conveyance so that the grantee can convey again free from dower? Explain fully.

2. It is said that a lease at will is not sufficient to support a remainder. Why?

3. Are the Statutes of Mortmain in force in Ontario? Why? Explain fully.

4. What is the effect of destroying a conveyance, both parties assenting to the destruction?

5. A., the owner of land, is disseised, and the trespasser remains in undisturbed possession for fifteen years without acknowledgment. In the ninth year A. mortgages the land and pays the interest regularly for four years and then makes default. The mortgagee then brings ejectment against the disseisor. Can he recover? Why?

6. A lease is drawn from A. to B. reserving rent to C., who has no interest in the land. Can C. distrain for the rent? Why?

7. A conveyance of land is made to A. B. and the Loan Association of Ontario, their heirs, successors, and assigns respectively, as joint tenants and not as tenants in common. What estates do the grantees take respectively? Explain fully.

BROOM'S COMMON LAW AND O'SULLIVAN'S GOVERNMENT IN CANADA.

1. State the principal rules relating to the construction of statutes.

2. In what cases are wrong-doers exempted from liability on the ground of *public policy?*

3. Explain *public nuisance* and *private nuisance* and show how the former may include the latter.

4. What is the difference between the facts which must be proved in order to attach a witness for disobedience to a subpœna, and those which must be proved in order to maintain an action for damages for such disobedience; and explain the reasons of the difference.

5. Explain the effect of *Mr. Fox's* celebrated *Libel Act.*

6. Define, and explain all the different kinds and degrees of *homicide.*

7. What provisions does the British North America Act contain in reference to the *allowance* and *disallowance* of Provincial Acts?

PERSONAL PROPERTY—JUDICATURE ACT AND RULES.

1. A *personal annuity* is given to A. and the heirs of his body. What interest does A. take?

2. Stock is settled in trust for A. for life, and after his decease in trust for his executors, administrators, and assigns. What is the effect? Why?

3. In case of insolvency of a partnership what is the rule as to payment of debts of the partnership, having regard to the joint and several assets of the partners?

4. A legacy is given by will to A. and B. and their respective executors as joint tenants. A. dies in the lifetime of the testator, what is the effect?

5. What was the difference between legal and equitable choses in action?

6. In the case of a writ not specially indorsed what proceedings may the plaintiff take on default of appearance?

7. What is an order of replevin, and how may it be obtained?

EQUITY.

1. State the general law applicable in cases of (1) gifts from a client to his solicitor; (2) purchases by a solicitor from his client.

2. Distinguish between contribution and apportionment.

3. Under what circumstances will the giving of time by a creditor to the principal debtor release the surety, and when not? Give reasons.

4. State the difference between a mortgage and a pledge of personalty: (*a*) In their nature; (*b*) as regards the remedies.

5. "A.," a trader has, by will, especially directed his trustee "B." to carry on his trade, setting aside the sum of $10,000 for such purpose. State the liability of the trustee, and the rights of creditors after the trade has been so carried on.

6. Under what circumstances will the defence of "*suppressio veri*" avail in an action?

7. State what acts are, and what are not sufficient part performance of a parol contract for the sale of lands in order to withdraw it from the operation of the statute.

Appointments to Office.

CORONERS.

District of Rainy River.

W. D. Lyon, of Rat Portage, to be a coroner for the District of Rainy River.

Wentworth.

H. S. Griffin, M.D., of Hamilton, to be a coroner for the County of Wentworth and City of Hamilton.

POLICE MAGISTRATE.

Oxford.

G. W. Hare, of Tilsonburg, to be police magistrate for the Town of Tilsonburg, without salary, *vice* L. McLean, deceased.

BAILIFFS.

Victoria.

Malcolm MacMillan, of Eldon, to be bailiff of the First Division Court of the County of Victoria, *vice* Angus McKinnon, resigned.

Northumberland and Durham.

Arthur Terrill, of Wooles, to be bailiff of the Tenth Division Court of the united Counties of Northumberland and Durham.

PARNELL *v.* "THE TIMES."—In Mr. Parnell's action against the *Times*, the defence put in is payment into court of forty shillings. It is thought that this is intended to indicate that the libel is not a gross one, as the Attorney-General in *O'Donnell* v. *Walter* admitted it was. This is not correct. The libel may be gross, but the damages may be small. A plaintiff may have so conducted himself as to excuse a publication which, standing alone, would be heavily punished by exemplary damages. This is what the *Times'* defence really means.—*Eng. Law Times.*

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with clause four of this Curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be), on conforming with clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher and pay $1 fee; and on or before the first day of presentation or examination file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hiliary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday of June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term, at 9 a.m. Oral on the Wednesday, at 2 p.m.

10. The Second Intermediate Examination will begin on the second Thursday before each Term, at 9 a.m. Oral on the Friday, at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term, at 9 a.m. Oral on the Thursday, at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term, at 9 a.m. Oral on the Thursday, at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after admission on the books of the society as student or articled clerk.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the

First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term. Candidates for Certificates of Fitness are not required to give such notice.

21. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

24. All notices may be extended once, if request is received prior to day of examination.

25. Printed questions put to Candidates at previous examinations are not issued.

FEES.

Notice Fee	$ 1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM for 1889 and 1890.

Students-at-Law.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil Æneid, B. I V.
- Cæsar, B. G. b, I.) 33.)

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I. II. and III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical reading of a selected Poem:

1889—Scott, Lay of the Last Minstrel.

1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the

Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek :—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1889—Lamartine, Christophe Colomb.
1890—Souvestre, Un Philosophe sous le toits.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography ; *or*, Peck s Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the years 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.
Arithmetic.
Euclid Bb. I. II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of clerkship mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition ; Manual of Common Law ; Smith's Manual of Equity ; Anson on Contracts ; the Act respecting the Court of Chancery ; the Canadian Statutes relating to Bills of Exchange and Promissory Notes ; and Cap. 123 Revised Statutes of Ontario, 1887, and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition ; Greenwood on Conveyancing, chaps, on Agreements, Sales, Purchases, Leases, Mortgages, and Wills ; Snell's Equity ; Broom's Common Law ; Williams on Personal Property ; O'Sullivan's Manual of Government in Canada, 2nd edition ; the Ontario Judicature Act ; R.S.O., 1887, cap. 44, the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110 143.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles ; Taylor's Equity Jurisprudence ; Hawkins on Wills ; Smith's Mercantile Law ; Benjamin on Sales ; Smith on Contracts ; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons ; Pollock on Contracts ; Story's Equity Jurisprudence ; Theobald on Wills ; Harris's Principles of Criminal Law ; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers : Best on Evidence ; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Michaelmas Term, 1888.

BISHOP RIDLEY COLLEGE

OF ONTARIO, LIMITED.

ST. CATHARINES.

A Protestant Church School for Boys, in connection with the Church of England, will be opened in the property well-known as "Springbank," St. Catharines, Ont., in September next, 1889.

Boys prepared for matriculation, with honors in all departments, in any University ; for entrance into the Royal Military College ; for entrance into the Learned Professions. There will be a special Commercial Department. Special attention paid to Physical Culture. Terms moderate. For particulars apply to the Secretary, 26 King St. E., Toronto.

FRED. J. STEWART, *Sec.-Treas.*

The Canada Law Journal.

VOL. XXV. JULY 2, 1889. No. 12

FOLLOWING our time-honoured custom, we shall issue but one number in each of the months of July, August, and September. Our next issue will therefore appear on the first of August. The long vacation is so completely given up to pleasure-seeking and recuperation that legal literature of all kinds is laid on the shelf. The seaside, the lakes, the mountains and the country have charms for the legal mind and body which "Comments on English Decisions," or "Early Notes of Canadian Cases" have, in long vacation, no power to rival.

BY section 29 of the Land Titles Act, (R.S.O., c. 116) it is provided that there shall be implied on the part of the person being registered owner of the land at the time of the creation of the charge, a covenant to pay the mortgage money and interest, at the appointed time and rate, and all taxes, sale-charges, rents, statute labour, or other impositions theretofore or thereafter imposed or charged on the land, and that in case of default all payments made by the owner of the charge may be added to the principal sum and bear interest. This is undoubtedly a wise provision, but it is to be regretted, we think, that the covenants to be implied are not more numerous and extensive. The only other covenant implied in the mere registration of a charge is one made necessary by the decisions of the courts in respect to interest after the principal money secured by an ordinary mortgage is due, viz., a covenant to pay interest, after the principal is due, half-yearly, at the appointed rate on so much of the principal money as for the time being remains unpaid. The almost invariable custom of solicitors and conveyancers in drawing mortgages is to insert all the ordinary statutory covenants. But in the ordinary charge under the Land Titles Act these are not implied. True, provision is made for inserting the words contained in certain of the covenants in the first column of the Act Respecting Short Forms of Mortgages, and the corresponding words of the second column are then to apply. But would it not have been much better if these covenants had been implied whenever land is charged under the Act with the payment of money? It would have been very easy indeed to make the proviso already in the Act for preventing the application of the covenants for payment of principal and interest, and for payment of interest at the appointed rate after maturity, extend to any other covenant. It would be more convenient to have the

covenants which are almost invariably inserted in mortgages, implied, without the trouble of actually expressing them; and, if for any reason, in any instance some of them are to be omitted, then provision can easily be made for briefly excluding such covenants.

Many of the charges already entered in the Land Titles office make no reference to the Short Forms Act, and have no special covenants, consequently they contain no power of distress for arrears of interest, and no agreement that, on default of payment of interest, the principal shall become due, and the power of sale contained in them is such as would be given by the brief clause in the first column of the Short Forms Act if the corresponding words in the second column did not apply. This is certainly a very meagre power of sale.

The tendency at the present time amongst those who lend money on mortgage security is to make the terms of the mortgage far more stringent than those of the Short Forms Act. It is only in rare instances that a mortgage is made more easy in its terms. The preponderance of convenience is certainly in favour of making the charge imply all the usual covenants, and inserting a clause in the Act, providing for a brief mode of excluding any of these which it may, for any reason, be desired to omit.

RECENT LEGISLATION.

With reference to the remarks in our issue for June 1st of this year, under the above heading, on the several subjects hereinafter mentioned, respectively, we wish to call the attention of our readers to the following points:—

An Act respecting Bills of Lading:—The conclusive evidence of an instrument as to the shipment of the goods, against the party signing it, is subject to the exception of actual notice of non-shipment to the holder of the Bill, and to the provision, that the master or person so signing may exonerate himself with respect to misrepresentation as to the shipment, by showing that it was caused without default on his part, and wholly by the fault of the shipper or holder, or of some person under whom the holder claims.

An Act respecting the Extradition of Criminals:—This Act is not to come into force with respect to fugitive offenders from any foreign State until a day to be named in a proclamation of the Governor-General with respect to such State; and shall cease to have effect with respect to fugitive offenders from any such State, on a day to be named in like manner; and shall apply only to offences committed in such foreign State after such day.

The Supreme and Exchequer Courts Act:—There is an exception as to the Province of Quebec, as respects appeals from a Court of Probate; and in the list "No. 1 of Maritime Province Cases," and "No. 2, Ontario Cases," the court may direct in what order the cases from the different provinces shall be entered.

An Act (c. 41) for the Prevention and Suppression of Combinations for and in Restraint of Trade:—Our remark as to the extremely problematical success of this measure is founded as well on the great difficulty of framing any provisions

which would meet the case, as on the singular way in which the provisions made by the Act are worded. In the Bill as introduced in the Commons by Mr. Wallace, combinations, agreements, or arrangements, for the purposes objected to were described, and made misdemeanors punishable by penalty not exceeding a certain amount, or imprisonment not exceeding a certain period, or both; and incorporated companies contravening the Act were made liable to forfeiture of their corporate rights and franchises so far as they were conferred or existed by virtue of any law of Canada; and the Act was not to affect the Revised Statute respecting trades unions. But by the Act as amended and passed, no new offence is defined and made punishable, but parties *unlawfully* doing certain things to restrain or injure trade or commerce, or *unduly* to effect certain purposes, are declared guilty of misdemeanor, and liable on conviction to a penalty not exceeding $4,000, nor less than $200, or to imprisonment for any term not exceeding two years; or if a corporation, to a penalty not exceeding $10,000, nor less than $1,000. The act constituting the offence must be *unlawful* by the law now existing, and the forbidden purpose must be *unduly* effected. We do not say there is anything unjust in these provisions, but they will be hard to advise or adjudge upon. The 22nd section of the Trades Unions Act, is that which exempts the purposes of such unions from being *unlawful* because they are in restraint of trade; but section 1 of the Act in question makes such restraint a misdemeanor, and is to be construed as if the said section 22 had not been enacted. How may this affect such unions?

An Act respecting Corrupt Practices in Municipal Affairs:—We are glad to see that the bribee is made punishable as well as the briber. How far might similar provision be made as to parliamentary elections?

THE LAW SCHOOL.

We presume it may now be considered that Mr. Justice Strong is no longer in the field for the principalship of the new law school. If he could have been secured there is no doubt that an overwhelming majority of those both in and outside the profession who take any interest in the matter, would have cordially approved of the selection. In default of so powerful a candidate, however, it is now most important that great deliberation should be exercised before the appointment is offered to anybody else. To select a second-rate man would be a deplorable mistake. The salary offered is a good one, and a thoroughly good man should be procurable for it; and it behoves the Benchers to take a broad and liberal view of the requirements of the situation, and spare neither time nor patience in seeking out and securing the best available candidate. Let us have a first-rate Canadian for the post by all means if we can find him; if not, let us have a first-rate Englishman; or if even that is denied us, let us throw out our net to the four quarters of the Globe, for a first-rate man we must have. A second-rate man—no matter how Canadian he may be—will not make the scheme a success—will not justify that compulsory attendance on the lectures which we understand is contemplated—and will bring disrepute upon the whole movement.

There is nothing in common between a jealous and narrow nativism and a wise and liberal patriotism. In his great book on the American Commonwealth, Professor Bryce, despite what Mr. Frederic Harrison terms in the *Nineteenth Century* the "good-natured character of his criticisms," cannot but deplore, and does on most unanswerable grounds deplore the narrow spirit of localism which characterizes the people of the United States generally, in respect, especially, to their selection of candidates for Congress and State Legislatures. The broader spirit of British institutions has prevailed to make this tendency, so injurious in its wide-spread results, less prevalent in Canada. Nativism, however, in the sense of preferring an inferior Canadian to a good outsider, is nothing but localism, and it is difficult, in our view, to exaggerate its folly when applied to such appointments as the principalship of a law school or a professorship at a university. It is no answer to say that it is discouraging to Canadians to feel that they cannot secure such appointments. Those who are to be taught and their interests alone should be considered in such matters,—and in the long run assuredly Canadian talent will be more advanced by such positions being held by really able and accomplished men, than by their being given to men who, *ex hypothesi*, would never have received them on their own merits, but owe their selection to the prevalence of a spirit which it is one of the chiefest aims of intellectual cultivation to dissipate. It is scarcely probable that a thoroughly good local man can be found for the principalship of the law school. Those who study law at all in this country almost invariably enter as soon as possible upon the practical work, first of a solicitor, and afterwards of an advocate. Few, if any, attempt to spend much time on the study of abstract jurisprudence or the philosophy of law in any of its branches. The whole conditions of the situation are too obviously against such studies to need our dilating upon them. Our sister colony of Australia is no doubt situated very much as we are in this respect, and certainly if the people of the city of Melbourne had—as in fact they very recently had—to look to England for a professor of law at their university, it will be little surprise if we have to do the same thing. The condition of things in London in these matters is very much the reverse of what it is here. The Bar in England is crowded with men who have attended lengthy courses of lectures and, in some cases, taken the highest honours in the jurisprudence schools of one or other of two of the oldest, the wealthiest and the best equipped universities in the world; and who, in the dearth of practical work, have, after supplementing their university training by some years' attendance in Barrister's Chambers in the Inns of Court, recurred to those studies for which their academic training has given them a taste and an aptitude; and in all probability have exercised their pen in magazine articles and reviews. From the ever increasing body of such men in London, a professor for our law school might, with a little trouble, by enquiring in the proper quarters, be secured, especially if, in addition to the salary offered the privilege of Chamber practice was extended, as it very well might be. In a very short time such a man would make himself quite sufficiently acquainted with what may be termed the local side of our law, and we venture to say the Benchers would never regret having looked for their man to that portion of our empire,

which must, from the very nature of things, for a long time be the principal seat of the intellectual life of our race.

The rules of the Law Society of Upper Canada concerning the reorganization of the law school have, we understand, been finally adopted by the Benchers in convocation, and approved by the judges of the Supreme Court of Judicature for Ontario, the Visitors of the Society, as is required by statute. We now give our readers a synopsis of the rules, and indicate the more important changes that have been made. The details connected with the working of the school are yet to be arranged by the legal education committee, who have power to make regulations not inconsistent with the rules, with respect to all matters relating to the proper working of the law school, but these regulations are to be reported to convocation at its first meeting after they are made.

The staff of the law school is to consist of a Principal, who shall be a barrister of not less than ten years' standing, not less than two lecturers, and two examiners, and it is provided that no person is eligible to be appointed examiner while holding the office of lecturer. The Principal is to have the supervision and general direction of the school, and is also to engage in lecturing, but it is expressly provided that he shall engage in no professional work other than that of consulting counsel, and he is not to be a member of any firm of practising barristers or solicitors, and he must reside in or near Toronto. He is to have the arrangement of the subjects and books for lectures, the branches to be treated of by each lecturer, the days and hours of lectures, and discussions in the school, subject to the approval of the legal education committee. For these services he is to receive a salary of $4,000 per annum.

The lecturers are to deliver *viva voce* lectures, to superintend the classes, prepare questions for classes, and generally to perform such duties as may be assigned to them by the Principal.

The course in the school is to extend over three years, and is to consist of lectures, discussions and examinations. The school year is to begin on the fourth Monday in September, and close on the first Monday in May, with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day. The work of each year must be completed and the examination thereon passed before a student is allowed to enter on the work of the next higher year.

All students-at-law or articled clerks, during the last two years of their attendance in chambers or service under articles, must take the second and third years of the school course; but if they are resident in Toronto during the last three years of their attendance or service then they must take the whole three years of the course. To this rule there are certain exceptions given below.

Provision is also made for accepting attendance at the lectures of any university law faculty approved of by convocation in lieu of the school course.

The fee payable by students is $10 for each term of the course, in advance.

Provision has been made for exempting from attendance those students and clerks who are graduates, and who, at the time of the coming into force of these rules, have entered upon the second year of their course; but if they are graduates and have not entered upon the second year of their course and are resident in Toronto, they must attend, at least, one term in the last year of the course. Five-year men who have entered upon the fourth year of their course are also exempt, but five-year men, now in the third year of their course and under service in Toronto, must attend at least one term. Five-year men in Toronto, who are in the second year of their course, must attend two terms in the school. Students and clerks outside of Toronto, admitted prior to Hilary term, 1889, are exempt from attendance.

We understand that hereafter examinations are to be held semi-annually, in May and September. The Committee is empowered to arrange examinations for those now on the books of the Society, in order that they may proceed to call and admission as heretofore.

One other important change is made; hereafter attendance for five years, or, in the case of a graduate, for three years in the chambers of a practising barrister, is required of candidates for Call to the Bar who have not served under articles in the usual way.

It must be evident to our readers that these regulations very seriously affect students, and also those members of the profession who practice outside of Toronto.

The expense consequent on attendance at a course of lectures for three sessions in Toronto is considerable and the extra fees charged add to the already heavy expense. Members of the profession outside of Toronto will be deprived of the services of the senior students during the busiest portion of the years in which their service is, by reason of growing knowledge and experience, most valuable.

It is important that the organization and management of the school should be such as to insure most thorough efficiency in every department. If the school is not made thoroughly successful, so that students will receive ample value for their money, and the public and profession be benefited by the increased thoroughness of professional training, there will not be anything like adequate compensation for the expense and inconvenience referred to. Much depends upon the appointment of the right man as Principal. If a scholarly man of wide legal knowledge, fitted by training and habit to instruct others, is appointed to the position, and if a sufficiently numerous body of competent lecturers are secured, then those most directly concerned will have the satisfaction of knowing that they are receiving full value for their time and money.

The necessity of great deliberation and care in appointing a Principal, is manifest. We have already enlarged upon this matter, and in connection with those remarks submit that if a competent local man cannot be found with a sufficiently wide range of knowledge and suited by temperament and training to discharge the duties of the office (and no one has yet been named who can be said to combine in his own person the necessary requirements), it would be well for some of

the Benchers, during their summer voyage across the ocean to see what can be done towards finding an efficient Principal in Great Britain. If necessary, some one might be charged with the duty of going over there for the express purpose of seeing what can be done in that direction. We hope that the mistake will not be made of appointing any person not thoroughly qualified to discharge the duties of the office. To do so would be to ruin the school in advance and to waste the time and money of students and inconvenience many members of the profession, without attaining any good result. The appointment of the proper man as Principal of the school, is of vital moment to the profession outside of Toronto. Their interests must not be overlooked, nor heedlessly sacrificed for the sake of a little time and trouble on the part of those who are their trustees in this matter, and to whom they look for protection.

As we go to press we hear that the Benchers have appointed Mr. W. A. Reeve, Q.C., Principal of the law school. Of the applicants for the position he was the best man. We are satisfied Mr. Reeve will not be lacking in his efforts to promote the interests of the school, and we hope it may prove a success under his management. At the same time we are still of the opinion that a serious mistake has been made in not going further afield and taking more time to find a person who, having larger experience and more thorough training, would more fully meet the many requirements of this most important position.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for June comprise 22 Q.B.D., pp. 641-749; 14 P.D., pp. 61-72; and 41 Chy.D., pp. 1-214.

PRACTICE—PARTIES—ADDING DEFENDANTS—RIGHT OF THIRD PARTY TO OBJECT—ORD. 16, R. 11 (ONT. RULE 324.)

In *Byrne* v. *Browne*, 22 Q.B.D. 657, a referee to whom a cause had been referred for inquiry and report, upon the application of the defendant, added a person as defendant under the following circumstances. The action was by a landlord for breach of covenant to repair. The original lessee had agreed to assign the residue of the term to one Diplock, who undertook to indemnify the lessee against the covenants in the lease. Diplock took possession, but no deed of assignment to him was executed. The lessee died, and her executors for a nominal consideration assigned the residue of the term to her son, who thenceforth received the rent from Diplock and paid it to the lessors. At the expiration of the term this action was brought against the son, and he claimed indemnity from Diplock and brought him in as a third party. The action was referred to a referee, and he, on the application of the defendant, added the

executors of the original lessee, that they might also claim indemnity from Diplock, the third party. The plaintiff and the executors did not object to the order, but it was opposed by Diplock. The Divisional Court (Denman and Stephen, JJ.) reversed the order, but on appeal the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) held that the order was right. The case is a curious one, because it will be observed that the defendants added, were persons against whom neither the original plaintiff or defendant had any claim or cause of action; and they were made defendants simply because they had a claim to indemnity against the third party, arising out of matters in question in the cause.

GAMING—PRINCIPAL AND AGENT—EMPLOYMENT OF AGENT TO BE FOR PRINCIPAL—8 & 9 VICT., C. 109, S. 18.

Cohen v. *Kittell*, 22 Q.B.D. 680, was an action brought by the plaintiff against the defendant for breach of contract in not making bets for the plaintiff as his agent pursuant to agreement. The plaintiff claimed to recover the excess of gains over losses which the plaintiff would have made had the bets been made: but the Divisional Court (Huddleston, B., and Manisty, J.) held the action would not tie; because, under the 8 & 9 Vict., c. 109, s. 18, "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to have been won upon a wager." The contract between the parties, therefore, was to enter into contracts which would have been void at law, and the performance of which could not have been enforced; and the breach of such a contract by the agent, it was held, can give no right of an action to the principal, because the principal suffers no real loss which can be recognized in a court of law. But in the absence of similar legislation in this province there appears to be no reason why such an action could not be maintained here.

CREDITOR'S DEED—EXECUTION OF DEED—ALTERATION OF DEED—ADDITIONAL PARTIES EXECUTING DEED, EFFECT OF.

In re Batten, 22 Q.B.D. 685, an assignment for the benefit of creditors was made whereby the debtor assigned his property to trustees for his creditors' benefit, and made parties thereto of the fourth part "the several persons, companies, and firms whose names and seals are hereto signed and affixed respectively being creditors of the debtors, and all other creditors of the debtor acceding hereto." The trust declared by the deed was to divide the balance of the proceeds of the estate after payment of expenses, etc., "rateably among the creditors parties thereto, including as such creditors, if the trustee and committee of inspection shall determine, but not otherwise, such persons being creditors of the debtor as may have refused or neglected to execute these presents." The deed was executed on the same day by the debtor, the trustee and one creditor, and within seven days was registered as required by an Act of Parliament which avoids such deeds unless registered in compliance with the Act. Subsequently to the regis-

tration six other creditors executed the deed. Subsequently a petition in bankruptcy was presented against the debtor, and he was adjudicated a bankrupt, and a receiving order made, against which the trustee of the creditor's deed appealed; but his appeal was dismissed by the Divisional Court on the ground that the deed was void in consequence of its execution subsequent to registration by the six creditors. The Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.), however, held, that having regard to the provisions of the deed, it was properly registered, and its subsequent execution by other creditors did not have the effect of altering it, but was simply carrying out what the deed as registered intended.

MUTUAL INSURANCE—MARINE INSURANCE—LIABILITY OF UNDISCLOSED CO-OWNERS, OR CONTRIBUTIONS TO LOSSES.

The short point determined in *Great Britain* v. *Wyllie*, 22 Q.B.D. 710, by the Court of Appeal (Lord Esher, M.R., and Bowen and Fry, L.JJ.) affirming Day, J., was simply this, that where the managing owner of a ship, having power to insure the vessel in a mutual insurance company, so insures it in his own name, he has authority to bind his co-owners to contribute to losses on other ships just as if they were actual members of the mutual insurance association.

INSURANCE (MARINE)—"IMPROPER NAVIGATION"—"IMPROPER STOWAGE."

In *Canada Shipping Co.* v. *British Shipowners' Mutual Protecting Association*, 22 Q.B.D. 727, Charles, J., was called on to decide whether a cargo of wheat which was tainted in consequence of the ceiling and limber boards of the vessel being saturated with a composition which had leaked from the previous cargo, was damaged "by improper navigation," and he held that it was not, and was of opinion that it was caused rather "by improper stowage."

SERVICE OUT OF THE JURISDICTION—BANKRUPTCY PROCEEDINGS.

The question *In re Wendt*, 22 Q.B.D. 733, was whether there is any jurisdiction to direct that an order requiring a bankrupt to attend for examination be served on the bankrupt out of the jurisdiction. The Court of Appeal (Lord Esher, M.R., and Fry and Lopes, L.JJ.) were of opinion that the Court had no power to make such an order, because there was no express legislative provision therefor. Lord Esher says, "When the legislature have enacted that a thing is to be done by the Queen's Courts, the meaning is only that the Court may do that thing within the Queen's dominions, unless the legislature have expressly said that it may be done outside those dominions, in which case the Court has only to obey." It is possible that even this is too broad a statement of the rule, and that instead of Queen's dominions he should have said "the territorial jurisdiction of the Court," which is, of course, not a co-extensive term.

NUISANCE—MASTER AND SERVANT—CRIMINAL LIABILITY OF MASTER FOR ACT OF SERVANT.

The principle laid down in *Chisholm* v. *Doulton*, 22 Q.B.D. 736, is that a master cannot be made criminally responsible for the negligent act of his servant. In this case the defendant was summoned for negligently using a furnace so as not to consume the smoke, as required by an Act of Parliament. There was no defect in the furnace, but the act complained of was due to the negligence of the defendant's servant, but for this, Field and Cave, JJ., held the defendant could not be made criminally liable. The only exception to the rule that no man can be made criminally liable for the act of another is where the legislature has expressly so provided.

MUNICIPAL LAW—DISQUALIFICATION—MEMBER OF MUNICIPALITY "CONCERNED IN CONTRACT"—(R.S.O., c. 184, s. 77.)

Nutton v. *Wilson*, 22 Q.B.D. 744, disposes of a point in municipal law. By an Act of Parliament a member of a local board who is in any manner concerned in any bargain or contract entered into by such board, shall cease to be a member, and a penalty is imposed on any member acting when so disqualified. The defendant, a member of such as a board, was employed a sub-contractor by persons having a contract with the board; and it was held by the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.), affirming A. L. Smith, J., that the defendant was disqualified and liable to the penalty, he having acted when so disqualified.

SHIP—DAMAGE—IMPLIED REPRESENTATION OF WHARFINGER.

The only case in the Probate Division which it is necessary to notice is *The Moorcock*, 12 P.D. 64, in which the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ,), affirmed the decision of Butt, J., noted ante vol. 24, pp. 580, holding that where a wharfinger agrees for hire to allow a vessel to discharge at his wharf, where the vessel must necessarily ground at low water, there is an implied representation on his part that the bottom adjoining the wharf is in such a condition as not to cause injury to the vessel, and is liable for the injury occasioned to the vessel by reason of its not being in that condition.

COMPANY—DIVIDENDS—PAYMENT OF DIVIDEND OUT OF CAPITAL—WASTING PROPERTY.

Proceeding now to the cases in the Chancery Division, the first is *Lee* v. *Neuchatel Asphalt Co.*, 41 Chy.D. 1, which was an action by a shareholder on behalf of himself and all other shareholders of a joint stock company, except the defendants, against the Company and the directors, to restrain the payment of dividends. The Company was formed to purchase a lease of, and work. an asphalt mine. The working of the mine necessarily diminished its value, and the directors, notwithstanding, proposed to distribute all profits realized over and above the working expenses. This the plaintiff claimed would amount in effect to a diminution of the capital of the company and should therefore be restrained. But Stirling, J.,

and the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) were of opinion that although an improper payment of dividends out of capital might be prevented, yet that there was no law requiring a company to keep its capital intact, or which prevents its paying a dividend, notwithstanding its capital has been sunk or lost: and though a payment of dividends might be restrained if no profits had in fact been realized, yet there was nothing to prevent a company dividing the profits actually realized over and above its working expenses, notwithstanding that owing to the wasting character of the property of the Company, the value of its capital was being yearly diminished.

THIRD PARTY—JURISDICTION TO GRANT RELIEF AGAINST THIRD PARTY—LIABILITY OF THIRD PARTY WHO DEFENDS, TO COSTS.

Edison v. *Holland*, 41 Chy.D. 28, is a case which throws some light on the effect of the somewhat curious procedure introduced, perhaps we might more properly say revived, by the Judicature Act in regard to third parties. The action was for the infringement of a patent. The defendant claimed indemnity from a third party, who was duly notified and obtained leave to appear, and defend the action. But the third party was not made a defendant and filed no pleadings, but appeared at the trial. The Court gave judgment at the trial, partly in favour of the plaintiffs and partly in favour of the defendant, but made no special order as to the third party. The plaintiffs appealed, and after judgment allowing their appeal with costs against the defendant, applied for an injunction and costs against the third party, and if necessary, to amend by adding the third party as a defendant. The injunction was refused by the Court of Appeal (Cotton and Lindley, L.JJ.), Cotton, L.J., holding that there was no jurisdiction to give a judgment against the third party as if he was a defendant, and that it would be wrong, after judgment in appeal, to allow the third party to be added as a defendant by amendment, so as to enable the plaintiffs to ask relief against him, which was not asked at the trial, and Lindley, L.J., though of opinion that the Court had jurisdiction to grant the liberty to amend, agreed that it was not proper to grant it in the present case. But the Court was unanimous that the third party, as well as the defendant, should be ordered to pay both the costs of the appeal, and the costs below, as the third party had in reality fought the plaintiffs throughout and failed.

TRADE MARK—INJUNCTION—FRAUD.

Thompson v. *Montgomery*, 41 Chy.D. 35, was an action to restrain the use of a trade mark. The plaintiff and his predecessors had for one hundred years carried on a brewery at a place called Stone, and their ale had become known as "Stone Ale," and they had registered several trade-marks which contained the words "Stone Ale" alone. The defendant built a brewery at Stone, over which he placed the words, 'Stone Brewery,' and when that was objected to by the plaintiffs, he altered it to "Montgomery's Stone Brewery," with a device containing the words, "Stone Ale," and a monogram somewhat resembling the plaintiff's. The

defendant also put up a similar device at one of his public houses at Liverpool. The action was brought to restrain the judgment from selling or advertising under the name of 'Stone Ale' or 'Stone ales,' any ale or beer not made by the plaintiff, and from carrying on the business of a brewer under the title of "Stone Brewery," or "Montgomery's Stone Brewery," or any other title calculated to induce the belief that the business carried on by him was the plaintiff's business, and from infringing the plaintiff's trade mark. The Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), though holding that the words "Stone Ale" could not be properly registered as a trade-mark, yet held that the plaintiff had acquired by user a right to use the words 'Stone Ale' within the principle of *Wootherspoon* v. *Currie*, 5 H.L., 508, and being of the opinion on the evidence that the defendant was endeavouring, by his use of the words, fraudulently to pass off his ales as the plaintiff's, affirmed the injunction granted by Chitty, J.

NUISANCE—LANDLORD AND TENANT—IMPLIED AGREEMENT FOR QUIET ENJOYMENT—DEROGATION FROM GRANT.

Robinson v. *Kilvert*, 41 Chy.D. 88, was an action in which the plaintiff, the tenant of part of a building, complained that the defendant, his landlord, was using another part of the building, which he retained in his own occupation, in a way that was prejudicial to the plaintiff, and he based his right to relief on the score of the defendant's use of his premises amounting to a nuisance, or at all events, as being in derogation of his grant. and a breach of an implied agreement for quiet enjoyment. The facts of the case were, that the defendant had let to the plaintiff a floor of the building to be used by him as a paper warehouse, but the defendant did not know at the time of letting that the plaintiff was going to store any particular kind of paper, liable to be deteriorated by an amount of heat which would not hurt paper generally. After the demise to the plaintiff, the defendant commenced a manufacture in the cellar which required the air to be hot and dry, and used a heating apparatus. This raised the temperature on the floor of the plaintiff's room to 80°, but the general air of the room was not nearly so high, and it did not appear that the plaintiff's work-people were inconvenienced. The defendant found the excessive heat injurious to his brown paper, and made it less valuable, and hence the present action. The Court of Appeal (Cotton, Lindley and Lopes, L.JJ.), however, affirmed the Vice-Chancellor of the County Palatine in dismissing the action, and held that the landlord was not liable either on the ground of nuisance, or of implied agreement for quiet enjoyment. Lindley, L.J., says at p. 97, "If the effect of what the defendants are doing had been to make the plaintiff's room unfit for storing paper, I should have been prepared to hold that there was a breach" (*i.e.*, of the implied agreement for quiet enjoyment). "But the evidence falls short of that—it does not show that the room is made unfit for a paper warehouse—but only that it was made unfit for storing a particular kind of paper. Now if the tenant wants extraordinary protection for a particular branch of trade he must bargain for it

in his lease." On the question of nuisance, Cotton, L.J., remarks at p. 94: "In my opinion it would be wrong to say that the doing something not in itself noxious, is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there, and does not interfere with the ordinary enjoyment of life."

PRACTICE—APPLICATION TO ADDUCE FIRST EVIDENCE ON APPEAL—ORD. 58, R. 4—(ONT. R., 585).

Ormison v. *Smith*, 41 Chy.D. 98, is another case in which the novel practice introduced by the Judicature Act is shown to be not always attended with the most benefical results to the suitor. In this case 52 plaintiffs, each having a separate and independent cause of action, joined together in one suit to enforce their rights. Of these, 40 appeared at the trial and gave evidence, and judgment was given in their favour. The other 12 did not appear; an adjournment was asked but refused, there being no evidence to show why they were not present. There being no evidence in favour of the absent 12, they were ordered to pay the costs occasioned the defendants by their being made co-plaintiffs. The 12 appealed, and nine of them on the appeal applied to be allowed to attend and give evidence at the hearing of the appeal, on the ground that at the trial six of them were too ill to attend, two had been travelling and had not received notice of the trial, and one had been called away to nurse a sick friend. But the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) were of opinion that none of these grounds were sufficient to warrant the Court in making the order, because the plaintiffs' solicitor was bound to keep up communication with his clients, so as to be able to produce them at the trial, or be able to produce such evidence of their inability to attend as would enable him to obtain an adjournment. Both Cotton and Lopes, L.JJ. indeed being of opinion that as the appellants had given no evidence at all at the trial, their application did not come within the spirit of Ord. 58, r. 4, (Ont., r. 585).

LESSOR AND LESSEE—MISDESCRIPTION OF LESSOR'S TITLE—COMPENSATION.

In *Clayton* v. *Leech*, 41 Chy.D. 103, the right of a lessee to compensation after conveyance of his lessor's title to which the covenants in the lease do not extend, there being no stipulation for compensation in the original contract, was considered. The facts were, that the landlord thinking he had an unexpired term of 32 years, whereas, in fact he had only one for 14 years, agreed with the plaintiff in writing, to grant him a lease for 21 years, nothing being said about compensation. The plaintiff accepted the lease for 21 years, and a year afterwards, on attempting to sell it, it was discovered that the defendant had only an unexpired term of 13 years. The plaintiff then claimed compensation; this the defendant declined to give, but offered to execute a new lease for the unexpired term, less three days. The action was then brought for rectification of the lease, and compensation; but the Court of Appeal (Cotton, Lindley, and Brown, L.JJ.) agreed with Kekewich, J., that as the conpensation was claimed in respect of a defect in

title, which plaintiff might have discovered before he took his lease, and there was no contract as to compensation, he was not entitled to compensation after taking it. The Court points out that *Besley* v. *Besley*, 9 Ch.D. 103, is not overruled by *Palmer* v. *Johnson*, 13 Q.B.D. 351, because the latter case turned on an express agreement for compensation, which it was held might be enforced even after the acceptance of a conveyance.

MORTGAGE—MORTGAGEE—COMMISSION—BONUS—COLLATERAL ADVANTAGE—REDEMPTION—SUBSEQUENT MORTGAGEE.

Mainland v. *Upjohn*, 41 Chy.D. 126. is another decision of Kay, J., on the law relating to mortgages, which follows close on *Jones* v. *Kerr*, noted ante p. 271, and may be regarded as a sort of supplement thereto. This was a redemptive action by a second mortgagee, in which the plaintiff insisted that the first mortgagee was not entitled to recover certain sums which he had by agreement with the mortgagor deducted from the amount of the loan by way of commission, over and above the interest which was secured by the mortgage. But it was held by Kay, J., that as the transaction was one that was well understood by the parties, and there was nothing unfair about it, that the deduction of the commission from the amount of the loan with the consent of mortgagor, was equivalent to a payment which could not be recovered back, and that the first mortgagee was entitled to hold his security for the full amount of the loan without any deduction for the commission retained; but it was held that the first mortgagees could not recover commission which had been agreed to be paid in addition to interest, but which had not actually been paid. A puisne incumbrancer was held to have the same right to object to a prior mortgagee's account as the mortgagor himself, but no greater right.

COSTS—COMPANY—WINDING UP PETITION—WITHDRAWAL.

In re Criterion Gold Mining Co., 41 Chy.D. 146, is a decision of Kay, J., on a mere question of costs. A petition for winding up a company was withdrawn, and he held that there is no rule of practice entitling shareholders and creditors appearing on the petition, to a separate set of costs, but that the matter is one within the discretion of the Court, and to be determined according to the circumstances of each case. In the present case, the petitioners had been induced to withdraw in consequence of an arrangement between them and the Company, for securing payment of the petitioner's debt, the shareholders appearing to oppose the petitioner, were allowed only one set of costs.

PRACTICE—JURISDICTION—DISCOVERY IN AID OF FOREIGN ACTION.

In Dreyfus v. *Peruvian Guano Co.*, 41 Chy.D., Kay, J., held that an action for discovery in aid of a foreign action cannot be entertained.

COMPANY—WINDING UP—CONTRIBUTORY—PAYMENT OF SHARES IN CASH—SET OFF OF PRESENT DEBT AGAINST LIABILITY FOR FUTURE CALLS.

In re Jones, Lloyd & Co., 41 Chy.D. 159, North, J., held, that where a shareholder in a company agreed with the company to set off a present debt due and

payable to him by the company in cash, against his liability for future calls, that such agreement amounted to a payment of the calls in cash.

CHARITY—MORTMAIN—9 GEO. II., C. 36—BONDS OF HARBOUR TRUSTEES.

The question *In re David Buckley* v. *Royal National Life-Boat Institution*, 41 Chy.D. 168, for the consideration of North, J., was whether certain bonds issued by harbour trustees, constituted an interest on land within the meaning of 9 Geo. II., c. 36. The trustees in question were entitled to collect tolls, among other things, for the use of bridges, and by the bonds in question, which were issued in pursuance of a statute, they assigned to the obligee "such portion of the several rates, tolls, rents, and other moneys arising by virtue of the Act, as the said sum of £100" bore to the whole amount advanced, upon the credit of such rates, tolls, etc. This, North, J., held to amount to an assignment of the bridge tolls specifically, and that these tolls constituted an interest in lands, and that consequently the bonds in question were within 9 Geo. II., c. 36, and could not therefore be given by deed to charities not authorized to hold land.

PAYMENT OF MONEY OUT OF COURT—ERRONEOUS ORDER MADE DEALING WITH FUND IN COURT—SOLICITOR, LIABILITY OF.

In re Dangar's Trusts, 41 Chy.D. 178, is a case deserving the careful attention of solicitors. In drawing up an order relating to money in Court it was, through the negligence of the solicitor, erroneously made to apply to the whole of the fund in Court, instead of to a part of it only. In pursuance of the order the money was paid out to persons not entitled, and this was an application by the party injured, to compel the party to whom the money had been erroneously paid, and the solicitor, to make good the loss. Stirling, J., after a very elaborate and careful review of the case, held that the solicitor was liable to make good any part of the fund which could not be recovered from the estate of the person to whom it had been erroneously paid.

FAMILY SETTLEMENT—INFLUENCE OF FATHER—INDEPENDENT ADVICE—BENEFIT TO FATHER.

The only case remaining to be noticed is *Hoblyn* v. *Hoblyn*, 41 Chy.D. 200, which was an action to set aside a re-settlement of family estates, on the ground that the settlor was under the control of his father and had no independent advice, and that by the settlement a benefit was given to the father. But Kekewich, J., upheld the settlement, holding that for the validity of a re-settlement of family estates by a son, being tenant in tail in remainder, it is not essential that the son should have independent advice, and the Court will not inquire whether the influence of his father was exerted with more or less force. But when the father obtains a benefit, that fact necessarily arouses the jealousy of the Court, but such a provision is not necessarily unfair, nor, if unfair, is it fatal to the entire arrangement, and the objectionable provision may be expunged without affecting the validity of the rest of the deed; and in the present case such a provision was released by the father, and the rest of the settlement was held good.

Reviews and Notices of Books.

The Amendments and Additions to the Public Statutes of Ontario Subsequent to the Revised Statutes, 1887. Arranged in a form suitable for consolidation or reference, with an index. By F. J. JOSEPH, of Osgoode Hall, Barrister-at-Law. Toronto: Rowsell & Hutchison, 1889.

To the legal profession, when several years have passed since the last consolidation of the statutes, the arrival of a new revision and consolidation, embracing all public enactments since the last consolidation, is a welcome event. It seems but a very short time since the last revision of the Ontario Statutes was put into the hands of lawyers; yet, short as the time is, the legislative activity of the provincial law-makers during two sessions has made extensive inroads into the revised statutes, and has not only changed many of them, but has also made extensive additions thereto. It is troublesome to have so often to refer to these books to find what the legislature says on the topic of inquiry. Our author seeks to minimize that trouble, if not to wholly remove it.

The book before us contains all the amendments and additions of a public character made during the last two sessions. This book is printed on only one side of the paper, and in the margin, in bold-faced type, the chapter and section of the revised statutes after which the amendment could be most advantageously inserted, are indicated. The idea is that, if it be so desired, the book may be cut up into slips and pasted into the revised statutes at the proper places. In that way the nearest approach that can at present be made to a consolidation of the statutes up to the present time, is obtained. The idea is a capital one, and Mr. Joseph has carried it out with his usual care and ability. The table of contents of the revised statutes may be amended by means of the additional references prepared for that purpose, so that it will completely indicate not only the old enactments but also the changes and additions.

However, if one does not wish to cut up the book, he may use it as a separate volume, and for this purpose it has a very complete index. There is also a table showing where Acts and parts of Acts subsequent to the revised statutes have been placed. The book is admirably fitted to save time and trouble in the use of the statutes. We are pleased that it has been published.

Handy Book on the Dominion and Ontario Franchises, with Notes, etc. By THOMAS HODGINS, Q.C. 124 pp. Toronto: Carswell & Co., Law Publishers.

This is a very useful little work, containing as it does the Act of last session amending the Franchise Act with that Act itself; the Manhood Suffrage Act of last year, and an Act respecting oaths under the Manhood Suffrage Act.

Our readers are well acquainted with previous works of a similar character by Mr. Hodgins, and so we need only say that in this one he quite sustains his reputation as a careful and painstaking annotator.

One thing, however, he has not undertaken to do—knowing, perhaps, the impossibility of it—and that is to explain the apparently unworkable nature of some of the chief sections of the Franchise Amendment Act. It has some way leaked out that at the meeting here last month of the county judges and revising officers, they were very far from being unanimously of opinion as to how the provisions of this Act are to be worked out, and as far as we can gather each was left to decide upon his own course of action. We cannot learn, so far as our inquiries go, that any of the county judges saw the Act in question before it was passed, and one of them told us that he never had received any Bills introduced into the Commons, and he believed his brother judges were in the same position.

Now as many Acts are there passed affecting the duties of our County Court judges, would it not be prudent to give those who have the carrying out of them an opportunity to supervise them before they become law? They, of all men, ought to be able to anticipate any difficulties likely to arise in the working of them. We believe that a copy of every bill introduced in the Ontario Legislature is sent at once to the county judges, and we have no doubt that they are sometimes able to point out improvements that might be made.

We understand that one of the many difficulties that arise under the Act we speak of, is as to how, when a new subdivision is to be formed, the list of names therefor—as taken from other subdivisions—is to be prepared; whether to be written out by the revising officer, or to be sent to Ottawa to be printed. From a circular issued by the Queen's printer, and which has appeared in some of the newspapers, we see it is suggested that these names be inserted in every supplementary list of names to be added, the fact being overlooked that the Act directs that that list is to contain the names of those persons *not already* on the original list. A still greater difficulty appears to arise under the new section 21, which directs the revising officer, after the final "revision," to correct the original list, by inserting in their proper places the names of the persons in the supplementary list of names added. This it is impossible to carry out literally, as there are no spaces left in the original list for that purpose; and if the revising officer has to make out a fresh list of all names, in alphabetical order, we pity him, when the amount of the remuneration he is to receive for all his work is considered.

A cursory examination of the Franchise Act leads us to the belief that the cost of printing in connection with these lists is likely to make a serious demand upon the finances of the country, and we cannot help contrasting it with the simplicity and inexpensive character of the Ontario Voters Lists Act.

Notes on Exchanges and Legal Scrap Book.

UNSWORN TESTIMONY BY CHILDREN.– Can a child, too young to be sworn, give unsworn evidence under the new Oaths Act? The words of the Act are, that "every person upon objecting to be sworn, and stating as the ground of such objection either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation," etc. We think, on the whole, that a child refusing, from fright or otherwise, to be sworn, could not be said to "object" under the Act to do what by the hypothesis he would not understand; but in Mr. Justice Stephen's Digest of Evidence (Note XL. on Article 107), the opinion is expressed that the Evidence Amendment Act, 1869 (32 & 33 Vict., c. 68, s. 4), repealed by the Oaths Act, 1888, rendered a child unfit to be sworn a competent witness by affirmation, on the grounds that "if a person who deliberately and advisedly rejects all belief in God and a future state is a competent witness, *a fortiori* a child who has received no instruction on the subject must be competent also." There is much force in this argument, and we hope that the passing of the Oaths Act may lead to the question being judicially determined.—*Eng. Law Times.*

LAW COURT COSTUME.—It is stated that a Montreal Judge has severely reprimanded a lawyer who appeared in court wearing a gown over a tweed suit. The lawyer said he did not see what difference it made whether his suit was tweed or broadcloth so long as he behaved himself; and he doubted whether any judge had a right to peer under his gown to see what kind of clothes he wore. The judge, however, was inexorable, and declared that a tweed suit must not be worn with a gown.

However, as the summer advances it may become the turn of the Bar to rebuke the Bench for similar breaches, etc., of etiquette. And if a precedent be required, an old one, the newer on that account to many readers, may be found in *The Barrister*, published in the year 1792. Quoth our author:—"A late worthy Baron of the Exchequer, who cloathed an excellent head and honest heart rather too negligently, met with no ill-timed sarcasm from a learned Serjeant who had made the Court wait one morning on the circuit. On his taking his place, the Baron, who sat as judge, observed rather sharply:

"Baron.—Brother, you are late, the court has waited considerably.

"Serjeant.—I beg their pardon; I knew not that your Lordship intended sitting so early; the instant I heard your trumpets I dressed myself.

"Baron.—You was a long while about it.

"Serjeant.—I think, my lord, (looking at his watch) not twenty minutes.

"Baron.—Twenty minutes! I was ready in five after I left my bed.

"Serjeant.—In that respect, my dog Shock distances your Lordship hollow; he only shakes his coat and fancies himself sufficiently dressed for any company."
—*Irish Law Times.*

How to Become a Notary.—The reign of red tape is far from being ended in the old world if we may judge by the following account of the steps necessary to become a notary public in England. It is from the English *Law Journal*:—"The receipt for making a solicitor into a notary in the country, begins, like Mrs. Glasse's, with 'First catch your district.' This district must be proved to have an insufficient number of notaries for its due convenience and accommodation. It is not enough to find a district, however large and populous, without a notary, to satisfy this requirement, because the district may not require a notary at all, and probably does not if its centre is an inland town without any trade with foreigners. Testimonials, certificates or proofs as to character, integrity, ability and competency may be required, and application must be made to the Court of Faculties of the Archbishop of Canterbury in Knightrider Street. It will be heard by the master of that Court, who is now Lord Penzance, and who has power to make rules regulating applications. There is an appeal to the Lord Chancellor, who, if the application was refused without just and reasonable cause, will direct an injunction to the Master of the Faculties, who, if he disobey it, will incur heavy penalties, and the faculty may be granted by two prelates named by commission under the Great Seal. So dignified is the office of a notary public."

Common Carriers.—In *New York, L. E. & W. R. Co.* v. *Burns*, New Jersey Court of Errors and Appeals, May 17, 1889, it was held that a common carrier employing a servant to work at a terminal point, and contracting to transport him to and from work, cannot through its train officials lawfully require him to vacate a seat which he is occupying in the car to which he has been duly assigned. The court said: "Whether his relations to the company was that of servant or passenger, his right to transportation rested in contract, the difference being merely in the form of the agreement. In either case, in the absence of anything to the contrary, the right to transportation will he held to include the ordinary incidents of railroad carriage. The terms offered plaintiff by the defendant included passage each way to and from Jersey City. This he accepted, and the defendant cannot now import into the contract any radical departure from its ordinary significance. If something different from an ordinary right of passage was intended, some intimation should have been given plaintiff at the time the offer was made and accepted. If pursuant to some regulation of the company the right to occupy a seat during the transportation contemplated by the agreement was a conditional right only, then actual notice thereof should have been given plaintiff, in order that the parties might deal with each other with equal knowledge. Plaintiff was not employed to work on the train, hence notice of train regulations will not be imputed to him. His work was at a terminus, and the offer of carriage as part of his compensation did not disclose anything different from an ordinary passage. It is true he was an employee of the company, and hence was subject to obey reasonable instructions from the proper officials. Had he intruded into a car reserved for ladies, or unsuitable for his accommodation, he might have

been required to leave it for another one; but when his immediate boss had indicated the smoking-car as the proper place for him, and it came down to the question of his right to be seated, he was not bound to take from the train-hands orders which would in effect deprive him of an essential part of his contract, and perhaps expose him to dangers for which he had not stipulated. The arguments of counsel for defendant, based on the supposed analogy between private master and servant and the present case, are inapplicable, for the obvious reason that the contracts of a common carrier for carriage must always take color from the *quasi* public character of the chief contracting party. I may compel my servant to vacate the seat I have assigned him to in my carriage for the same reason that I may refuse to receive him in at all, notwithstanding he offer me money for his fare."—*Albany Law Journal.*

LEGAL NOISE.—Every good citizen is interested in knowing how much noise the law will compel him to endure at the hands of his neighbours without redress and many citizens who are not good will doubtless like to ascertain how much noise they can inflict upon their neighbours without fear of punishment. Several decisions bearing upon these points have lately been made by the courts. One broad principle well established in the law of noise, both in this country and England, curiously illustrates the serious bent of our Anglo-Saxon nature, and that is the sharp distinction drawn between money-making noises and those which are made in the pursuit of pleasure. The law is tender to a steam-engine or a boiler-maker, and will allow them to disturb a whole neighbourhood with impunity, but is severe on a brass band or a game of skittles. The good citizen must be wary about playing bowls or skittles in populous places. The Italians order this matter differently, and restrain blacksmiths, boiler-makers, etc., within somewhat close limits as to time and place, whereas they allow musical merry-makers to make night hideous or beautiful, as the case may be, without any restraint whatever.

The dog, in English and American jurisprudence, stands upon the border line, because he may be considered in either aspect—as kept for use, when a watch-dog, or for pleasure, when regarded merely as a companion or an ornament. Here, however, we run against another principle of the common law, according to which dogs are privileged persons. For instance, it is unlawful for a farmer to shoot another's dog, who has eaten his sheep, provided it be the animal's first offence of that kind; for the dog who is young in the sin of sheep-killing may repent and lead a respectable life thereafter; but if he has already been convicted of the crime, then it is lawful to shoot him. In other words, as Lord Mansfield once said, "the law allows every dog in England one bite at a sheep."

It has, however, been held that "the noise produced by a dog barking in the night is a nuisance, and that a man may shoot the dog and abate the nuisance when on his own premises"—that is, we presume, when the dog is on his own (the shooter's) premises; for it has never been lawful for a man to stand on his own

premises and shoot a dog in his neighbour's yard. A great judge, Lord Kenyon, held that a dog barking at night is not a nuisance; but it is doubtful if this would be considered good law at the present day. According to the definition given by one writer, a noise is a nuisance when it is "unusual, ill-timed, or deafening." This is plainly incorrect, for the noise of a nightingale in the streets of Boston would be "unusual," but hardly a nuisance. Some very "ill-timed" noises are also, in the eyes of the law, not nuisances. Thus it has been held, in the case of *Pool* v. *Higginson*, that it is not a nuisance for the parent of an infant suffering from colic to trundle a baby-carriage all night in a boarding-house, over the head of a nervous bachelor editor. The noise may not have been unusual, and perhaps was not deafening, but it would be an abuse of language to say that it was not "ill-timed." Probably what saved the parent in this case was the fact that the noise was useful, for the evidence tended to show that the baby was relieved by the trundling. On the other hand, useless noises, "such as a concert [we quote from a decision of the Supreme Court of Massachusetts], although they disturb but a single person, may constitute a nuisance." It has very properly been held that a "show having brass bands, when continued two weeks," is a nuisance. It is not likely that many people will quarrel with this decision.

A kindred subject is that of nuisance by vibration. If a man attempts to operate a steam-hammer next door to a dwelling house the law will restrain him. One authority states the rule as follows: "The vibration must produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary *tastes* and *habits*." The words in italic seem to imply that some persons like more vibration than others, and are in the habit of "vibrating" themselves.

Residents in the Back Bay who are accustomed to pile-drivers in their close vicinity may be said to have acquired the habit of vibrating, but we doubt if they have any "taste" for it. However this may be, the sum of the matter is, that in the interest of trade or manufactures, you may vibrate or deafen your neighbour, with few restrictions, but that for purposes of pleasure your faculty of noise-making must severely be repressed.—*Boston Daily Advertiser.*

THE PLACE OF LAW IN CIVILIZATION.—We often hear the remark that as the world grows better there will be less and less need of lawyers; and the logical conclusion follows that when all men become perfectly upright and honest, lawyers will be wholly unnecessary.

Such views result from a superficial observation of the part that law plays in the progress of human society.

Even if the remark were true, the time is so long before such a state of human perfection can be expected, that it is idle to consider it. It does, however, furnish a text for a brief comment upon the part that law plays in the history of civilization. With the uncivilized man the word business is unknown. He kills with his rude implements of death whatever he needs for food, or what-

ever threatens his safety. He works only so far as self-preservation compels him to. Activities, industries, the clashing of competitive interests are to him unknown. The relations of one member of a savage tribe to the others of his race are few and unvaried. The occasions for disagreement are few in number and confined to a small class of interests. Death among them leaves no accumulations of property, the rights to which must be settled. Common carriers are unknown, and hence the liability and duty of that class of persons are also unknown. Manufacturing, shipping, the transportation of commerce, and partnership relations exist only in the rudest form, if at all, and consequently the rights and duties incident to all such relations never come into dispute. Their relations are so few in number that their laws are necessarily few and simple. If we pass from this rude people into the presence of the most highly civilized classes of American or European countries, we observe an endless variety of relationships. Division of labour produces diversity of interests; the endless variety of things possessed as property, gives rise to a correspondingly endless series of rights and duties. Manufactures, mining, commerce, trade in its endless diversity, transportation of every kind, personal liberty as conceived in the refinements of modern thought, our domestic relations endless in number and unequalled in importance, our complicated governmental machinery of towns, counties, villages, cities, states, encircled within a national authority, present a complicated and involved mass of rights and obligations of increasing importance, and of endless multiplication in number; concerning all of which there must be an understanding and agreement among men in the form of a rule of action, otherwise business must cease and civilization become impossible.

Hence from the simplicity of barbarian life to the complex conditions of the civilized world, we find the necessity of law increasing in proportion to the advancement of human society.

Civilization is not merely a multiplication of man's desires, it is also a multiplication and an interweaving of his interests,—a multiplication of his conditions increasingly important, and increasingly complex.

A common understanding, a uniform rule of adjustment in the endless collisions of interests, personal rights, business competitions, and of antagonistic industries must be agreed upon; and such rule of order, so agreed to, and duly enacted by proper authority, is the law governing those complicated and opposing rights.

Every step in civilization adds an appendix to our statutes, either increasing them by new laws or modifying them by necessary changes in the old. The higher the civilization of any State the more numerous its laws. Each advancing step in science and invention opens the way and reveals the necessity for new enactments. The telegraph, the telephone, the railroad, and the innumerable number of corporate existences that have sprung into being during the last decade have demanded constant legislative and judicial attention. Civilization is the progress from the simple to the complex. And as society, in its business, its division of labour, its social relations and political conditions become more intricate and involved, so will its jurisprudence become proportionately more comprehensive and refined.

There is a constant element in law, consisting of the fundamental principles of natural justice that runs through every system of jurisprudence the world has seen; but there is also a varying element—an element ever changing to meet the endless demands of social progress—and in the course of human advancement this element enlarges its scope, multiplies its refinements and attains a degree of complexity proportionate to the involved interests and conditions of mankind, and as social relations and political conditions become more intricate and involved, so will jurisprudence become proportionately more comprehensive and refined. This varying element, ever changing in its efforts to meet the endless demands of social progress, constitutes by far the most comprehensive and complicated part of any system, and it multiplies in its refinements, enlarges its scope, demands greater minds and profounder thought for its comprehension and mastery, as society itself progresses in the arts of peace. There is, therefore, and ever will be a growing demand for an accurate knowledge of the laws of men and for an increasing skill in their just and benevolent application.

No class of men has so much to do with the character of a country's laws as its lawyers. Other classes of citizens arise in spasmodic ire under the real or fancied hardship of some social condition and legislate rashly for a season, but lawyers and courts ultimately examine, test and pass judgment upon such enactments, and by their judicious management, and under their broad views of the just and expedient, the law is made an instrument of good, or prevented from becoming an instrument of evil.

There is a general feeling all over the country that there should be a more thorough preparation on the part of gentlemen entering the bar. A longer course of study and a more thorough drill in the fundamental principles and details of the profession are demanded.

There is no profession where a higher order of intellect, a greater degree of culture and a more exalted standard of morals are required than in the legal profession. The demand in the practice of law is for men of profound learning, for minds trained to accurate and logical thinking, and for men whose integrity is beyond suspicion. For such the demand grows, and will continue to grow, so long as men shall progress in the science of government and in the arts of peace. —*The Advocate.*

DIARY FOR JULY.

1. Mon.....Dominion Day. Long vacation begins.
3. Wed. ....Quebec founded 1608.
4. Tue .....Declaration of American Independence 1776.
6. Sat.....County Court Sittings for Motions, except in York, end.
7. Sun.....*Third Sunday after Trinity.*
10. Wed .....Christopher Columbus born 1447.
13. Sat.....Sir John Robinson, 7th C.J. of Q.B., 1829.
14. Sun.....*Fourth Sunday after Trinity.*
15. Mon.....St. Swithin.
19. Fri..... ...Quebec capitulated to the British, 1620.
21. Sun.....*Fifth Sunday after Trinity.*
22. Mon.....W. H. Draper, 9th C.J. of Q.B., 1863. W. B. Richards, 3rd C.J. of C.P., 1863. Act uniting Upper and Lower Canada assented to, 1840.
24. Wed.....Battle of Lundy's Lane, 1814.
25. Thu .....Canada discovered by Cartier 1534.
28 Sun.....*Sixth Sunday after Trinity.* Wm. Osgoode, 1st C J. of Q.B., 1792.
30. Tue .....Relief of Derry.

Early Notes of Canadian Cases.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

FERGUSON, J.] [Dec. 7, '88, and Jan. 30, '89.

O'NEILL *v.* OWEN.

Will—Execution—Attestation—Revocation—Devise to infants—Conveyances by heirs-at-law—Registration—Priorities—R.S.O., 1877, c. 3, s. 75—"Inevitable difficulty"—Crops—Possession—Costs.

The plaintiffs were the devisees of the land n question in this action under the will of H. O'N.; the defendant A. O'N., the father of the plaintiffs, was one of the heirs-at-law, and had obtained conveyances of the land from the other heirs-at-law of H. O'N.; and the defendant O. was the assignee of all the estate of A. O'N.; and had besides a mortgage from A. O'N. over the land in question.

On the 17th April, 1877, H. O'N. signed a will in the presence of one witness; another witness was then called in, before whom the testator acknowledged his signature, and then both witnesses signed in the presence of the testator and of each other. On the 23rd April, 1877, the testator, desiring to have two changes made, caused two sheets of the will to be rewritten and read to him; the two sheets were then put into the place of the old ones, the document pinned together, and on the last sheet, which was not one of those rewritten, the date 17th was changed to 23rd. The same witnesses were then called in and the testator then acknowledged his signature to the will, and each of the two witnesses his. The two sheets taken out of the will were afterwards destroyed by one H. by the direction of the testator, but not in his presence. The testator died a few days after this without having made any other will. The will of the 23rd April was offered for probate, but was refused by a Surrogate Court.

Held, that the will of the 17th April was duly executed; but that the will of the 23rd April was not duly executed and probate of it was properly refused; and the will of the 17th April was not revoked by the destruction of the two sheets, out of the presence of the testator, nor by the defective execution of the will of the 23rd April, the intention of the testator not being to cancel the whole of the earlier will, but only to make two changes in it, and he being under the belief the later will was a valid one; and it was adjudged that the earlier will should be admitted to probate.

By this will the plaintiffs were to come into possession when they should become of the age of 21 years, not being less than 12 years from the date of the testator's death, and they were infants of tender years at the time when, after the death of H. O'N., the defendant A. O'N., their father and guardian, agreed with the other heirs-at-law for the purchase of their shares, on the assumption that H. O'N. had died intestate, and obtained conveyances from them. A. O'N. and the other heirs-at-law were at this time aware of the facts in regard to both the wills, and were also aware that, after probate of the will of 23rd April had been refused, it was the opinion of the solicitor for the estate that the will of the 17th April was properly executed, and that probate might be obtained.

Held, that the plaintiffs' rights were not defeated or prejudiced by the agreement and conveyances referred to; nor were the plaintiffs' rights defeated by the registration of the conveyances to A. O'N. and his assignment and mortgage to O.; for A. O'N. had actual notice and knowledge of the plaintiffs' rights; and the plaintiffs were prevented from registering the will by "inevitable difficulty" or "impediment" within the meaning of R.S.O., 1877, c. 3, s. 75.

The defendant O. by a counter-claim asked for damages, being the value of a crop in the ground and deprivation of possession of the land for a year or more, but a reference to assess these damages was refused. The plaintiffs and the defendant O. were allowed costs out of the estate, except that the defendant O. was ordered to pay the costs occasioned by charges made by him of fraud and collusion; no costs were allowed to or against the defendant A. O'N.

W. R. Meredith, Q.C., and *T. G. Meredith* for the plaintiffs.

M. D. Fraser and *R. M. Meredith* for the defendant Owen.

The defendant Albert O'Neill in person.

ROSE, J.] [June 8.

IN *re* CROFT AND TOWN OF PETERBOROUGH.

Municipal corporations—By-law—Submission to electors—Liquor License Act, R.S.O., c. 194, s. 42—"Electors," meaning of.

S. 42 of the Liquor License Act, R.S.O., c. 194 provides for the Council of any municipality passing a by-law requiring a larger duty to be paid for tavern or shop licenses than is imposed by s. 41, "but not in excess of $200 in the whole, unless the by-law has been approved by the electors in the manner provided by the Municipal Act with respect to by-laws which, before their final passing require the assent of the electors of the municipality."

A municipal council having submitted to the electors and passed a by-law providing for a larger duty than $200, a motion was made to quash it on the ground that certain leaseholders had not been allowed to vote upon it, it being assumed by the council that s. 309 of the Municipal Act, R.S.O., c. 184, governed as to the votes of leaseholders.

Held, that s. 309 did not apply; and that the word "electors" in s. 42 must be read as referring to the same class as "electors" in s-s. 14 of s. 11 of R.S.O., c. 194, viz.: those entitled to vote at an election for a member of the Legislative Assembly; and the reference to the Municipal Act in s. 42 must be confined to the manner of holding the election.

The by-law, not having been submitted to or approved by the electors according to this interpretation of the statute, was quashed with costs.

Poussette, Q.C., for the plaintiff.

E. B. Edwards for the town of Peterborough.

ROSE, J.] [May 17.

WYLIE *v.* FRAMPTON.

Married woman—Conveyance of real estate—Necessity for joining husband—Tenancy by the curtesy initiate—R.S.O., c. 132, s. 4, s.s. 2, 3—Order under 51 Vict., c. 21.

The question in this action was whether the husband of the plaintiff was entitled to a tenancy by the curtesy initiate in certain land of the plaintiff which she agreed to sell to the defendant, so as to require the joining of the husband in the conveyance.

The marriage took place in 1867, and issue had been born alive. The land was acquired by the plaintiff, one portion in 1879, and the remainder in 1882.

Held, that the case was governed by R.S.O., 1877, c. 125, s.s. 3 and 4, the same as s-s.s. 2 and 3 of s. 4 of R.S.O., 1887, c. 132, and the land could not be conveyed by the plaintiff alone, unless by virtue of an order under 51 Vict., c. 21, so as to give the purchaser a title free from the husband's claim; and under the circumstances of this case such an order was made.

Semble, the wife could convey her own estate in the land.

Re Konkle, 14 O.R. 183, and *Adams* v. *Loomis*, 24 Gr. 24, considered.

Schoff for plaintiff.

E. D. Armour for defendant.

STREET, J.] [June 17.

Re RICHARDSON AND CITY OF TORONTO.

Re HOSPITAL TRUST AND CITY OF TORONTO.

Municipal corporations—Expropriation of lands—Compensation to owners—Method of estimating—Benefit to lands not taken—Special Assessment—49 V., c. 66.

Under the authority of 49 Vict., c. 66, the City of Toronto expropriated the land of private persons near the River Don for the purposes of "the Don Improvement Scheme." By the Act the City Council were to make a survey and plan of the 400 feet on each side of a certain line called "the centre line," shewing the lands taken by them, and were to apportion to each lot shewn upon the plan a due share of the whole

cost of the land, works, and improvements ; and by s. 4, s-s. 3, the lands not taken within the 400 feet were to be specially assessed in respect of such improvements, but no such special assessment was to exceed the actual value of the benefit derived from the improvement.

R. and the H. T. owned lands extending from the centre line to a distance exceeding 400 feet, and the city took from such lands a strip narrower than 400 feet.

Held, that in awarding compensation to R. and the H. T., under the Municipal Act, for the parts of their lands taken, the arbitrators should allow for any benefits to the parts not taken, but in estimating that benefit they should take into account as best they could the fact that the land-owners were liable to be charged by the city to the extent of the benefit they received by a rate as for a local improvement under s. 4, s-s. 3.

Bain, Q.C., and *H. D. Gamble* for the land-owners.

W. A. Reeve, Q.C., and *C. R. W. Biggar* for the City of Toronto.

Chancery Division.

FALCONBRIDGE, J.] [December 4, '88.

THE ELECTRIC DESPATCH COMPANY OF TORONTO *v.* THE BELL TELEPHONE COMPANY OF CANADA.

Telephone Company — Messenger business — Agreement as to transmission of orders for messengers — Other telephone subscribers rights—Construction of agreement.

The defendants were a company carrying on a general telephone business with a central office to connect subscribers' telephones, and in addition, carried on a messenger business for the purpose of delivering letters, messages, etc. By an agreement, the defendants assigned their messenger business to the plaintiffs, and covenanted that they would not transmit or give any messenger order to any person except the plaintiffs, and that they would cease to do such business.

The Great North-Western Telegraph Co. (one of the defendant's telephone subscribers) subsequently opened an office for a messenger business, and applied for a telephone in the usual way, which the defendants supplied them with, and by means of it the G. N. W. T. Co. received orders for messengers, etc.

Held, that the defendants did not transmit or give messenger orders when they placed a subscriber in communication (through the central office) with the G. N. W. T. Co., that they only afforded him a medium by which to transmit, or give, his own order, which was a case not provided for by the agreement, and the action for an injunction to restrain defendants was dismissed with costs.

Robinson, Q.C., and *Reeve*, Q.C., for the plaintiffs.

Lash, Q.C., and *S. G. Wood*, for defendants.

BOYD, C.] [May 28.

Re CENTRAL BANK, MORTON AND BLOCK'S CLAIMS.

Banks and banking—Definite receipts—Negotiability — Estoppel — Bank Act — R. S. O., c. 120, secs. 43, 65, 83.

Morton and Block filed claims with the liquidators of the Central Bank as *bona fide* purchasers for value and indorsees of deposit receipts of the bank, originally issued to Cox & Co., in the following form :

CENTRAL BANK OF CANADA,
Toronto, Oct. 18th, 1887.

$6,000.

Received from Cox & Co. the sum of $6,000 which the bank will repay to the said Cox & Co. or order, with interest at 4 per cent. per annum, on receiving 15 days notice. No interest will be allowed unless the money remains with this bank six months. This receipt to be given up to the bank when payment of either principal or interest is required.

For the Central Bank of Canada,
A. A. ALLEN, *Cashier*.

Ent., A. B. ORD, *Acc't.*

Held, that even if such a receipt did not possess all the incidents of a promissory note yet it was meant to be transferred by endorsement, being made payable to the order of Cox & Co.; and it was therefore governed by a line of authorities, which showed that it was so far negotiable (whether possessing all the incidents of commercial paper or not) so as to pass a good title to a *bona fide* purchaser for value, who took without notice of any infirmity of title.

But *semble*, that these deposit receipts as drawn were negotiable instruments under which

the claimants were entitled to succeed as upon a promissory note made by the bank.

G. H. Watson for the claimants.

W. R. Meredith, Q.C., contra.

BOYD, C.] [JUNE 6.

BURKITT *v.* TOZER.

Will—Construction—Heirs and representatives.

A testator, by his will, made a bequest to "the heirs and representatives of Mr. Miles Burkitt." The question for decision was, who were entitled to take, under this expression, the executors or administrators of the deceased, or his next of kin, according to the Statute of Distributions?

Held, in looking at the context, that the next of kin, according to the statute, were the persons entitled.

The weight of authority tends to show that the word "representatives," when found standing alone, is construed as executors or administrators, but, that very slight expressions in the context have turned the meaning in the other direction, to that of next of kin.

F. E. Hodgins for the plaintiffs.

A. Cassels, *E. T. English*, and *J. A. Macdonald*, Q.C., for other parties.

FULL COURT.] [June 12.

REGINA *v.* ROMP.

Criminal law—Confession—Improper inducement—Evidence.

When it appeared that a police officer said to the prisoner who was arrested on a charge of obstructing a railway train, by placing blocks upon the line, "The truth will go better than a lie. If any one prompted you to it you had better tell about it." Whereupon the prisoner said that he did the act charged against him.

Held, that the admission was not receivable in evidence, and a conviction found on it was improper.

A. B. Aylesworth for the prisoner.

No one appeared for the Crown.

FULL COURT.] [June 13.

BARBER *v.* MCKAY.

Ejectment—Probate—Evidence—New trial—Pleading—R.S.O. 1887, c. 61. ss. 38, 44.

This was a motion by defendant to reverse the judgment delivered at the trial in an action of ejectment. The defendant claimed to hold the land in question under a deed from the executor of the will of one S.

At the trial the only evidence of the will offered by the plaintiffs, was the copy of the probate which was on registry with the affidavit of verification.

The plaintiffs, however, endeavoured to support their case by reference to a certain statement in the defendant's pleading, in which she claimed to occupy, under a deed made by the executor, under the will of S.

Held that the copy of probate put in, was not proper evidence of the will, no notice having been given under R.S.O. 1887, c. 61, s. 38.

Held further, that the plaintiffs could not count upon one part of the statement of defence to eke out the insufficiency of their evidence, while they rejected the rest of it, but must prove the facts relied on in the proper way.

Shilton for the plaintiff.

Bain, Q.C., for the defendant.

FULL COURT.] [June 15.

CLARKSON *v.* SEVERS.

Assignment for creditors—Execution in Sheriff's hands—Completely executed by payment—Constitutionality—Bankruptcy—R.S.O. 1887, c. 124, ss. 4, 9.

This was an appeal from the judgment of Robertson, J., given at the trial, holding that certain moneys realized by the Sheriff on a sale made under a writ of execution in his hands, were the property of the execution creditors as against the assignee under an assignment made by the execution debtor, for the benefit of his creditors. The facts were as follows: An execution against the lands of one H., had ever since the year 1880 been standing in the sheriff's hands. Eventually, in 1887, the sheriff made a seizure and sale, and received the purchase money therefor. Before, however, he had paid over to the execution creditors the amount due them, H. made an assignment for the benefit of his creditors. The assignee immediately notified the sheriff of the assignment and claimed the moneys realized at said sale, and which were still in his hands, on the ground that the writ had not been completely executed by payment within the meaning of R.S.O., 1887, c. 124, s. 9, and that therefore the assignment took precedence of it.

Held, affirming the decision of Robertson, J., with costs, that the assignee was not entitled to the money.

Per BOYD, C.—R.S.O., 1887, c. 124, s. 9, applies to cases of execution where the Creditors' Relief Act applies, and did not apply to the writ in this case, which was in the sheriff's hands prior to that Act, and was executed by the sale of the lands and taking of the money, which money then became the property of the execution creditor.

Semble, that if R S.O., 1887, c. 124, s. 9, is to receive such a construction as would pass the money in this case to the assignee for creditors, thus giving to him a higher right than the execution debtor had, the Act would be *ultra vires* as a bankruptcy provision.

Per FERGUSON, J.—The authorities are clear to show that after receipt of the moneys by the sheriff, the execution was executed: *Semble*, therefore, that completely executed by payment in R S.O., 1887, c. 124, s. 9, means "voluntary or involuntary payment to the sheriff."

Millar for the motion.

T. G. Galt contra.

Practice.

MR. DALTON.] [June 12.

CLARKE *v.* CREIGHTON.

Costs—Defendant a solicitor—Instructions to another solicitor.

The defendant was himself a solicitor, but retained another solicitor to conduct his defence, and was awarded costs against the plaintiff.

Held, that the defendant was entitled as against the plaintiff to the usual costs of a defendant.

S. R. Clarke, plaintiff in person.

C. Millar for defendant.

FERGUSON, J.] [June 15.

CAMERON *v.* PHILLIPS.

Administrator ad litem — Order appointing, form of—Rule 311.

In framing an order under Rule 311 appointing an administrator *ad litem* it is not sufficient to say, "it is ordered that A. be, and he is, hereby appointed administrator *ad litem* to the estate of B.;" the order is really a grant of administration, and should contain the particulars mentioned in Rule 48 of the Surrogate Rules; and, if such is the fact, should also, in view of R.S. O., c. 50, s. 50, state that the administration is of the real and personal estate.

J. B. O'Brien for plaintiff.

FERGUSON, J.] [June 24.

IN *re* DELANTY.

Infants—Sale of land—Dispensing with examination of imbecile infant.

Upon a petition under R.S.O., c. 137, s. 3, for the sale of lands belonging to three infants, the examination of the eldest, a girl of sixteen, was dispensed with, notwithstanding the provisions of s. 4 of the Act and of Rule 999, upon the ground that she was an imbecile.

Re Lane, 9 P. R. 251, and *re* Harding, 13 P. R. 112, followed.

Hoyles for the mother.

F. W. Harcourt for the infants.

Law Students' Department.

The following papers were set at the Law Society Examination before Easter Term, 1889:

CERTIFICATES OF FITNESS.

REAL PROPERTY AND WILLS.

1. A devisee, since the Devolution of Estates Act, registers the will by delivering a sworn copy to the Registrar. He then offers the land for sale. Can he make a good title on his own conveyance? Why?

2. A will is witnessed by three witnesses (two being sufficient), one of whom is a legatee. What is the effect upon the attestation, and upon his legacy?

3. What is the effect of altering the text of a will after execution? How should a necessary alteration be made so as to place its validity beyond dispute?

4. What are the chief general rules to be observed in construing wills?

5. When can you, and when can you not, have a certificate of *lis pendens* set aside on motion without a trial of the action? Explain fully.

6. When an open contract for the sale of land is made, and it is discovered that there is an incumbrance on the land, what are the purchaser's rights respecting the same? If the

incumbrancer is not bound to release, and will not do so, what course can be pursued to complete the contract?

7. A debtor has land in two counties upon which he has given one mortgage comprising all the land. Writs of *fieri facias* against his lands are issued and placed in the hands of both counties. Do they bind the lands so as to enable the sheriff to sell? Why?

8. What is meant by saying that an abstract should commence with a good root of title? Give examples of instruments which do not form a good root.

9. What leases are required to be registered so as to preserve priority?

10. What is a bare trustee?

SMITH ON CONTRACTS—BENJAMIN ON SALES.

1. A. sends by mail to B. an offer to sell him certain goods at a named price. B. mails a letter of acceptance. Before the mailing of the letter of acceptance, A. mails a letter of withdrawal, which B. does not receive until after his letter of acceptance is mailed. Is there any contract? Reasons.

2. Is a contract of sale complete if no price is agreed on?

3. Explain briefly the connection between the question whether the vendor of goods has lost *his lien* for the price, and the question whether there has been a sufficient *receipt* of the goods to satisfy the Statute of Frauds.

4. Are the following tenders good: (*a*) A debtor owing $90 hands his creditor 100 ten dollar bank bills, and tells him to take out of them what is due him; (*b*) the debtor hands the creditor 5 twenty dollar bank bills and demands the change?

5. Which is in general the *consideration* for a sale of goods; the payment of the price, or the purchaser's *obligation* to pay it?

6. A merchant orders 100 barrels of flour from a miller, who sends him 200 barrels. What different courses may the purchaser legally adopt?

7. When a contract made in the United States is sued on in Ontario, by what law are the *interpretation* of the contract, and the *remedy* upon it respectively governed?

8. If the amount written on the body of a note and the figures in the margin do not agree, will oral evidence be admitted to prove which is right? Why?

9. An agreement is made verbally between A., B., and C. for good and sufficient consideration, by which A. assumes and agrees to pay a debt owing by B. to C., and C. releases B. from the debt. Is such agreement valid? Why?

10. What, if any, effect will a written acknowledgment of the debt signed by the debtor, have upon the running of the Statute of Limitations, if the acknowledgment contains a promise to pay the debt upon a certain condition?

MERCANTILE LAW—STATUTES—PRACTICE.

1. A., B., and C. sign a promissory note, commencing "we promise to pay." What is their liability?

2. Explain the difference in result between the following cases:

(1) A. consigns goods to B. under a bill of lading, expressing that the goods are shipped by order, and on account of B.

(2) Goods are delivered by A. to C., to be carried under a bill of lading, whereby C. undertakes to carry for or on account of A., and to deliver to A. or the assignee of the bill of lading.

3. A. sells goods to B., and sends them to B.'s house on B.'s instructions so to do. When they reach B.'s house he refuses to take the goods because A.'s clerk says he has instructions from A. not to leave the goods without receiving the money for them. How far could A. succeed in making B liable for the goods? Why?

4. How far can money be recovered from an agent to whom it has been paid for the use of his principal but such payment turns out to have been wrongfully made?

5. A. is security for B., who is C.'s clerk; B. commits a fraud upon C., which C. agrees to overlook, not wishing to injure B. Subsequently B. again commits a fraud upon C., who thereupon sues A. for C.'s default. What defence could A. raise? Why?

6. A. sues B. on an agreement to buy goods, and B. enters an appearance. Statement of claim is delivered, but no statement of defence. What steps can A. take to obtain judgment?

7. At what stage of an action can a plaintiff withdraw his case, or part of it, without an order?

8. In what cases may relief by way of interpleader be granted?

9. A. is a creditor of C., B., a friend of C., buys part of C.'s stock, and instead of paying the

money to C. pays it to A. to the prejudice of A.'s other creditors. What is the position of the transaction as between A. and the other creditors? Why?

10. A. verbally agrees with C. to work on his farm for two years at $1.00 per day and his keep. After the expiration of six months he gets tired of the job and leaves. C. sues A. for damages for breach of the contract of hiring. What defence has A.?

EQUITY.

1. What was the law as to the liability of a purchaser of land from a trustee under a will to seeing to the application of the purchase, and how, if any way, has the same been altered by statutory enactment?

2. An infant representing himself to be of full age, sells and conveys his property. He afterwards refuses to give up possession, and on an action for possession sets up his infancy and the invalidity of the conveyance. Can he succeed? Why?

3. A client comes to you stating that he elieves himself entitled to an interest in certain property in the township of York. What steps would you advise him to take in order to test his claim, and protect his interest?

4. Distinguish between the effect on the contract of non-disclosure of facts in policies of insurance, and contracts of suretyship and guarantee respectively.

5. What are the provisions of 27 Eliz., c. 4, and what, if any, Provincial Legislation is there affecting the same?

6. A mortgagee issues a writ of foreclosure of the mortgaged lands. The mortgagor desires a sale instead. Can he procure it?

7. What was, and what is now the law with regard to the employment of puffers at auction sales?

8. What is meant by the doctrine of Illusory Appointments? Give an illustration.

9. What must you show in order to invalidate an award, (*a*) on account of mistake in law; (*b*) on account of mistake in fact?

10. A trustee is uncertain as to how he should proceed in the management of the trust property. How would you advise him? Give authority.

Miscellaneous.

AUTUMN CIRCUITS, 1889.

CHANCERY DIVISION.

THE HON. MR. JUSTICE PROUDFOOT.

TORONTO.....	*Monday*	..28th October.

THE HON. THE CHANCELLOR.

OTTAWA.....	*Monday*	...28th October.
KINGSTON.....	"	.. 4th November.
BELLEVILLE.....	*Friday*	.... 8th November.
COBOURG.....	*Thursday*	..14th November.
CORNWALL.....	*Monday*	...18th November.
BROCKVILLE.....	*Friday*	...22nd November.

THE HON. MR. JUSTICE PROUDFOOT.

LINDSAY.....	*Monday*	..23rd September.
BARRIE.....	*Friday*	...27th September.
WOODSTOCK.....	*Thursday*	. 3rd October.
STRATFORD.....	"	.10th October.
WHITBY.....	*Wednesday*	.16th October.
PETERBOROUGH..	*Tuesday*	.22nd October.

THE HON. MR. JUSTICE FERGUSON.

ST. CATHARINES..	*Tuesday*	..17th September.
GUELPH.....	*Monday*	..23rd September.
OWEN SOUND....	"	..30th September.
BRANTFORD.....	"	.. 7th October.
SIMCOE.....	"	..21st October.
HAMILTON.....	*Wednesday*	.30th October.

THE HON. MR. JUSTICE ROBERTSON.

GODERICH.....	*Thursday*	.19th September.
WALKERTON.....	*Monday*	..30th September.
LONDON.....	*Wednesday*	9th October.
CHATHAM.....	*Thursday*	.24th October.
SANDWICH.....	"	.31st October.
SARNIA.....	"	. 7th November.
ST. THOMAS.....	"	.14th November.

AUTUMN CIRCUITS, 1889.

The Courts of Oyer and Terminer and General Gaol Delivery and of Assize and Nisi Prius in and for the several Counties of the Province of Ontario, will be held as follows:—

THE HON. MR. JUSTICE FALCONBRIDGE.

TORONTO (Civil Court),	*Tuesday*,	10th September.
" (Criminal Court),	*Monday*,	7th October.
ST. CATHARINES....	"	21st October.
ORANGEVILLE.....	"	28th October.
MILTON.....	"	4th November.
BRAMPTON.....	"	11th November.

THE HON. CHIEF JUSTICE ARMOUR.

L'ORIGINAL.....	*Monday*...	9th September.
OTTAWA.....	*Thursday*.	12th September.
PEMBROKE.....	*Tuesday*..	24th September.
PERTH	*Monday*...	30th September.
PETERBOROUGH..	*Tuesday*..	8th October.
LINDSAY.....	"	..15th October.
BARRIE.....	"	..22nd October.
OWEN SOUND....	"	.. 5th November.

THE HON. MR. JUSTICE ROSE.

LONDON.....	*Monday*..	9th September.
CHATHAM.....	"	..23rd September.
ST. THOMAS.....	"	..30th September.
SANDWICH.....	"	.. 7th October.
SARNIA.....	"	..14th October.
GODERICH	*Tuesday*..	22nd October.
WALKERTON.....	*Monday*..	28th October.
WOODSTOCK	"	.. 4th November.

THE HON. MR. JUSTICE MACMAHON.

WHITBY.....	*Monday*..	9th September.
PICTON	"	..16th September.
NAPANEE.....	*Thursday*.	19th September.
BELLEVILLE	*Monday*..	23rd September.
KINGSTON	"	.. 7th October.
CORNWALL.....	"	..14th October.
BROCKVILLE.....	"	..21st October.
COBOURG	"	..28th October.

THE HON. MR. JUSTICE STREET.

WELLAND.....	*Tuesday*..	10th September.
STRATFORD	*Monday*..	16th September.
SIMCOE.....	"	..23rd September.
HAMILTON	"	..30th September.
CAYUGA.....	*Tuesday*..	15th October.
BERLIN.....	*Monday*...	21st October.
GUELPH	"	.28th October.
BRANTFORD.....	"	.. 4th November.

N. B.—There shall be at every Nisi Prius Court a Jury List and a Non-Jury List. The former shall be first disposed of, and the latter not taken until after the dismissal of the Jury Panel, unless otherwise ordered.

A Judge will remain in Toronto to hold the Sittings of the Court each week, and for the transaction of the business in Chambers.

Of which all Sheriffs, Magistrates, Gaolers, and other Peace Officers are required to take notice.

A. GRANT,
Clerk of the Supreme Court of Ontario.

Dated 19th June, 1889.

OSGOODE HALL LIBRARY.

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Wright on Magistrates, London, 1889.

HABEAS CORPUS.—In Perry county, Ohio, a horse was once restored to its rightful owner under a writ of *habeas corpus* issued by a justice of the peace. A.'s horse broke into B.'s pasture, whereupon B. put it into his stable, locked the door and refused to give it up. A. secured the services of the celebrated Shep. Tinker as his legal adviser. Shep. knew that his client could not give the necessary bail in an action by replevin, so he decided to bring a different sort of an action. With this intent he went before a justice of the peace in old Straitsville, and took out a writ of *habeas corpus* and literally brought the horse into court. Lawyer Saunders, a most brilliant practitioner at the Logan bar, and long the prosecuting attorney of Hocking county, was called on the other side. He didn't know the nature of the case until the constable made his return upon the writ. "Why," exclaimed Mr. Saunders, with a look of blank astonishment, "this court can't issue such a writ, and no court could issue one for a horse!" Shep. was more than equal to the emergency. "Your honor," he said, "a wise and just court can do anything that is laid down in the books. The writ of *habeas corpus* has been recognized as sacred for centuries. To say that this court can't issue it is to say that it is ignorant of Magna Charta." "But this court kin issue it," interposed the justice, "and it has issued it already." Mr. Saunders saw his mistake and apologized to the court for having doubted its ability to do anything it chose. It is needless to say that the horse was restored to its owner.—*Cincinnati Enquirer.*

An American judge says: "Long ago recognizing that jurors should receive more courtesy than they sometimes do, it is my habit, in discharging them, always to thank them with pleasant words. So at the term just adjourned at Jackson, in discharging the grand jury, which had been unusually long in session and returned many indictments, I thanked them for their attendance, referred to the efficiency of their work, hoped they would carry to their homes pleasant memories of the court, and that their business had not suffered as much as they feared when they wished to be excused and were not, that we should have the pleasure of seeing them again, etc. To this the foreman usually bows, expresses his pleasure and that of his fellows for the courtesies received from the court and its officers, etc. This time the foreman, who was a very zealous Baptist, fresh from a revival, which he was more anxious to attend than serve on the grand jury, astonished and embarassed the court by replying about in this phrase: 'The grand jury, one and all, most cordially reciprocates your honor's sentiments,' etc., making quite a speech upon the kindness received from all the officials. 'And now, as an evidence of our good-will, *we propose to extend to your honor the right hand of fellowship.*' He was about to go through this performance, when the Court, mindful of its dignity and full of apprehensive mirth, politely declined the proffered hand-shaking. Imagine the condition of the Bar."—*Albany Law Journal.*

Appointments to Office.

DIVISION COURTS CLERKS.

Oxford.

John C. Ross, of Tilsonburg, to be Clerk of the Sixth Division Court of the County of Oxford, *vice* John Hodgson, deceased.

Carlton.

John Kerr, of Kars, to be Clerk of the Fifth Division Court of the County of Carlton, *vice* C. G. Lindsay, resigned.

Bruce.

John Humberstone, of Ripley, to be Clerk of the Ninth Division Court of the County of Bruce, *vice* Paul D. McInnes, deceased.

BAILIFFS.

Leeds and Grenville.

John O'Leary, of Prescott, to be Bailiff of the Second Division Court of the United Counties of Leeds and Grenville, *vice* Jas. Jenkinson, resigned.

Manitoulin.

Daniel Anderson, of Gore Bay, to be Bailiff of the Fifth Division Court of the District of Manitoulin, *vice* J. C. Nelles, resigned.

Bruce.

Chas. A. Richards, of Tara, to be Bailiff of the Seventh Division Court of the County of Bruce, *vice* John D. White, resigned.

Lennox and Addington.

Thomas Neal, of Cloyne, to be a Bailiff of the Seventh Division Court of the County of Lennox and Addington.

The Canada Law Journal.

VOL. XXV. AUGUST 1, 1889. No. 13

WE call the attention of our readers to the letter of Mr. Seymour D. Thompson, one of the editors of the *American Law Review*, which appears elsewhere in this issue. That eminent legal writer evidently appreciates the painstaking and thorough character of the work done by the learned Master-in-Ordinary. We have had occasion before now to urge through these columns on the proper authorities the importance of the duties discharged by this officer and by the learned Master-in-Chambers as well: duties of a judicial nature, requiring for their proper discharge legal ability and learning of a high order. We regret that the talents and legal attainments which these two judicial officers undoubtedly possess do not bring them the substantial appreciation by the government in the way of salary to which they are both properly entitled. We have always been surprised that Canadian decisions receive so little attention from the courts either in the United States or in Great Britain. We have no doubt, however, that the time is at hand when Canadian reports will be cited frequently in the courts of both these branches of the great English family.

MAINTENANCE.

From a very early period in the history of English law it has been considered an offence for persons officiously to intermeddle and concern themselves in promoting litigation, in which they themselves have no direct or immediate beneficial interest.

This offence is known to the law by the name of "Maintenance"; but of this offence there are several species. Maintenance proper consists in a person unlawfully taking in hand, or upholding quarrels and suits wherein he is not concerned, to the hindrance of common right: Bac. Abr. Tit. *Maintenance:* and see per Buller, J., in *Master* v. *Miller*, 4 T.R. 340. When, in addition to intermeddling unlawfully in maintaining the suit of another, the offender bargains, as a consideration for his doing so, for a part of the land, or other proceeds of the litigation the offence is called "champerty," which is said to be the unlawful maintaining of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it: Bac. Abr. Tit. *champerty* and champertors were defined by 33 Ed. I., *ordinat. consp.* as follows: "Champertors be they that move pleas and suits, or cause to be moved either by their own procurement

or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains." And in *Sprye* v. *Porter*, 7 El. & Bl. 58, it is said to institute champerty there must be a suit pending for the recovery of the property, the subject of the agreement, or a stipulation for the amount of one. When the offender carries out his officious and unlawful interference, by seeking corruptly to influence the Court or jury, or by dissuading a witness from giving evidence, this species of maintenance is termed "Embracery," Russ. on Cr., vol. 1, c. 21. If he further make a common practice of maintaining suits unlawfully the offence is called "Barratry," and the offender "a common barrator." *Ib.*, c. 22.

The offence of maintenance is one which by both the common law and statute law is punishable criminally by fine and imprisonment, and by summary committal if committed in the face of the court; but of recent years resort to criminal proceedings for the redress of such wrongs has been rarely had. Not only is the offender criminally liable, but he is also responsible in damages to the party injured. The offence of maintenance is not *malum prohibitum* merely, but it is *malum in se*, per Lord Eldon, *Wallis* v. *Duke of Portland*, 3 Ves. 502.

The offence is a common law offence, but various statutes have imposed specific penalties for the commission of particular kinds of maintenance. The origin of the statutory enactments upon this subject may no doubt be found in the attempted abuse of legal proceedings, by oppressive combinations to carry them into effect, by those who, previously to the establishment of law and order in the reign of Edward I., accustomed to associate for robbery and violence; see 2 Hume's History of England, 320; and by a statute passed in the 33rd year of Edward I., which is the earliest statute on the subject, persons engaging in the unlawful maintenance or promotion of suits were declared to be conspirators.

The state of society has very much changed since the days of Edward I., Richard II., or even those of Henry VIII., in whose reigns the chief statutory enactments relating to this offence were passed. The interference of the rich and powerful in legal proceedings is now less likely than of old to produce any failure of justice, and both by the course of legislation and of judicial decision, the rigour of the common law and of the more ancient statute law on this subject, has of late years been greatly modified. For instance, the 32 Hen. VIII., c. 9, invalidated the sale of pretended titles where the settler had been out of possession for more than a year before the sale; but its provisions are very considerably modified by R.S.O., c. 100, s. 9, which authorizes the sale of contingent executory and future interests, and of possibilities coupled with an interest in land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, and of rights of entry present or future, and whether vested or contingent, into, or upon land.

There is another still more ancient statute, 1 Ric. II., c. 9, which invalidates as against the plaintiff in an action, all sales of the land in dispute made by a defendant *pendente lite*, but whether it is affected by R.S.O., c. 100, has not, we believe, been expressly determined. This statute of Richard II. was expressly

repealed in England in 1863 by the Statute Law Amendment Act, but it appears to be still in force in Ontario.

England and her colonies have acquired justly a pre-eminent distinction as law-abiding communities; and if we take the trouble to search into the matter we shall find that the secret of this universal respect for law and the judicial tribunals, which prevails throughout the British dominions, is due in a great measure to the salutary checks and safeguards which were placed about the administration of the law in bygone days, and which had the effect of inspiring all classes of the people with confidence that the law would be fairly and justly administered so far as that ever could be secured by human means. It was, no doubt, to this anxiety to ensure respect for the law of the land and the tribunals by which it was administered, and also as a necessary corrollary of the well-known maxim of the civil law, "*interest rei-publicæ sit finis litium*," that the laws relating to maintenance came into being. In the early days of our history it was, and no doubt justly, considered detrimental to the impartial administration of justice, that any person not of kin to the litigants in a court of justice should appear even in court with them publicly to espouse their cause, to plead for them or even to ask others to be of counsel for them. And one can readily understand that a powerful and influential man might, by an ostentatious intervention in support of the cause of another, be the means of over-awing or exercising thereby an undue influence over judge and jury in a semi-barbarous age, so as to induce them to depart from the strict line of duty—and even if judge and jury were impervious to such assaults upon their integrity, it would nevertheless be difficult to convince a losing suitor that they had been so. Many acts, however, which in the early period of our history were deemed maintenance, would probably in the altered circumstances of our civilization, no longer be held to be so. Recent cases both in our own and in the English courts have clearly established that maintenance as an offence still exists, and though the punishment of it by criminal proceedings may have fallen into disuetude, it nevertheless still constitutes a good cause of action for damages to the person injured.

It may be useful, therefore to inquire what, according to the modern authorities, constitutes this offence, and how redress is given when it has been committed.

In Bacon's abridgment we find it is laid down that whoever is of kin, or godfather, to either of the parties, or related to them by any kind of affinity still continuing, may lawfully stand by at the bar and counsel him, or pray another to be of counsel to him, and a barrister-at-law may plead the cause of his client; but none of these may lawfully aid the party with money in the cause, unless he stand in the relation of father, or son, or heir apparent, or husband to the party, see Bac. Abr. Tit. *Maintenance* (B); 1 Hawk. P.C., c. 27, s. 26. A landlord it would seem may aid with money his tenant in defence of the tenant's title to the land demised, but not as regards other lands not holden of himself, 1 Hawk. P.C. c. 27, s. 29.

A master may also aid his servant by counsel and advice, and even with money to keep him out of prison; but it would seem he cannot safely lay out

money for the servant in an action relating to land, unless he have some of his wages in his hands, and the servant consents to their application in that manner, Bro. Tit. *Maintenance* 44, 52; Hawk. P.C., c. 27, ss. 31-33; and see *Elborough* v. *Ayres*, 10 Eq. 367. A servant cannot lawfully lay out his own money to assist his master in a suit, 1 Hawk. P.C., c. 27, s. 34. But in a very recent case it has been held that any one may assist a poor man with money as a matter of charity to enable him to maintain or defend a suit, *Harris* v. *Briscoe*, 17 Q.B.D. 504; 55 L.T.N.S. 14. A solicitor when specially retained may lawfully defend, or prosecute an action, and lay out his own money in a suit: 2 Inst. 564, Bac. Abr. Tit. *Maintenance* (B) 5; 1 Hawk. P.C., c. 27, ss. 28-30. Where a similar demand is made against several persons they may, without being guilty of maintenance, combine together for the purpose of resisting the demand, *Findon* v. *Parker*, 11 M. & W. 675; and see *Gowan* v. *Nowell*, 1 Me. 292; *Plating Co.* v. *Farquharson*, 17 Chy.D. 49.

The fact of relationship between the parties, although it may justify the aiding with money or with assistance in carrying on or defending a suit, will not justify that species of maintenance called Champerty. Where two cousins entered into an agreement whereby it was arranged that one of them should bring a suit to contest a will purporting to make a former will, on the understanding that the other of them would share with the plaintiff in the proposed action half the estate recovered thereby, it was held that the agreement was void in champerty, notwithstanding the relationship of the parties: *Hutley* v. *Hutley*, L.R., 8 Q.B. 112.

The fact of a person having a direct interest in the subject matter of litigation justifies him in assisting a party in prosecuting or defending an action; but it is doubtful whether an indirect interest is sufficient. In *Langtry* v. *Dumoulin*, 7 O.R. 644, the Divisional Court of the Chancery Division was divided in opinion as to whether, in an action against a rector affecting the endowment of his church, the vestry and churchwardens of the church were entitled to carry on the litigation in the rector's name on an agreement to indemnify him against the costs. Subsequently the vestry and churchwardens applied to be made formal defendants in the action, which was refused by the Court of Appeal: 11 App. R. 544, but the application was afterwards granted by the Supreme Court. It would therefore appear that the weight of authority is in favor of the view that the vestry and wardens had not the right lawfully to carry on the defence in the rector's name; otherwise it would not have been necessary for them to apply to be made defendants. But even where there is an unlawful agreement for maintenance, the plaintiff's action cannot be stayed on that ground; thus an agreement by an association of persons with whom a petitioner was connected, to pay the costs of an election petition was held not to warrant the Court in staying the proceedings: *North Simcoe Election—Edwards* v. *Cook*, 1 H.E.C. 617. But though a suitor cannot be debarred from his right to prosecute his suit on the ground of the existence of an agreement for maintenance, yet it would seem clear that the agreement could not be enforced by the suitor against those who had agreed to maintain him; see *Wallis* v. *Duke of Portland*, 3 Ves. 494. In

Hilton v. *Woods*, 4 Eq. 432, the plaintiff was not aware that he was the owner of certain coal mines until his solicitor informed him of it. An agreement was then made between the plaintiff and the solicitor that in consideration of the solicitor guaranteeing the plaintiff against costs the solicitor should have a portion of the property. The defendant claimed that the bill should be dismissed, but Malins, V. C., said in giving judgment, "I have carefully examined all the authorities which were referred to in support of the argument (as to dismissing the bill), and they clearly establish that wherever the right of the plaintiff in respect of which he sues is derived under a title founded on champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any which goes the length of deciding that when a plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise. . . . If Mr. Wright had been the plaintiff suing by virtue of a title derived under that contract it would have been my duty to dismiss the bill. . . . In this case the plaintiff comes forward to assert his title to property which was vested in him long before he entered into an improper bargain with Mr. Wright, and I cannot, therefore, hold him disqualified to sustain the suit." And he refused to dismiss the bill, but he also refused the plaintiff his costs, though granting a decree in his favour. But it would seem that if in such a case the action failed, the defendant would have had a good cause of action against the solicitor for maintenance, *Harris* v. *Briscoe*, supra. Thus when a member of parliament induced, under a promise of indemnity against costs, a man of straw to prosecute an action against another member of parliament for penalties for sitting and voting without having duly taken the required oaths, which action failed, it was held that was unlawful maintenance, and the member of parliament who had instigated the proceedings was held liable for all costs incurred by the defendant in the action: *Bradlaugh* v. *Newdegate*, 11 Q.B.D. 1.

As it is unlawful, generally speaking, to assist another directly with money to carry on or defend litigation, in which one is not concerned, it is also unlawful to do so indirectly by buying or taking an assignment of a bare right to litigate. Although a mere right of entry may be sold and conveyed under the statute already referred to, yet ever since that statute it has been held that the purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud, partakes of the nature of champerty, and will not be enforced: *De Hoghton* v. *Money*, 1 Eq. 154; 2 Ch. 164; and see *Hovey* v. *Hobson*, 51 Me. 62; *Little* v. *Hawkins*, 19 Gr. 267; *Wigle* v. *Setterington*, 19 Gr. 512; *Muchall* v. *Banks*, 10 Gr. 25; *Prosser* v. *Edwards*, 1 Y. & C. (Ex.) 481. But when a party, having obtained an assignment of a judgment against a mortgagor, thereupon brought an action against the mortgagee, who had sold under the power of sale, to compel him to account for the surplus moneys left in his hands after such sale, it was held that the plaintiff was entitled to sue, and that the assignment was not in contravention of the law respecting champerty and maintenance: *Harper* v. *Culbert*, 5 O.R. 152. But where a creditor of a

company presented a petition for winding up and then assigned his debt and the right to prosecute the petition to another, it was held to be invalid; and an order made for winding up, at the instance of the assignee, was reversed: *In re Paris Skating Rink Co.*, 5 Chy.D. 959. But the purchase of shares in a company for the purpose of instituting a suit to restrain the company from carrying out any agreement alleged to be illegal, was held not to be maintenance: *Hare* v. *London & N.W.Ry. Co.*, Johns. 722; and an assignment by a legatee of his legacy was upheld, though made for less than it was worth to a person who bought it for the purpose of enforcing payment by suit: *Tyson* v. *Jackson*, 30 Beav. 384. But though an infringement of a right of litigating is in some cases void, yet the law allows the assignment of *choses in action*, not only in the case of negotiable instruments which are assignable by the law of merchant, but also other *choses in action*, which by the common law were not assignable, R.S.O., c. 122, ss. 6-12; and the assignee is entitled to sue for the recovery of the *chose in action* assigned in his own name. But this Act does not make valid a voluntary assignment made merely for the purpose of enabling the assignee to sue, on the understanding that he was to share in the proceeds secured, *Re Cannon, Oates* v. *Cannon*, 13 O.R. 70; but the assignor on a re-assignment being made to him may, notwithstanding the previous champertous assignment, recover the *chose in action*, *Re Cannon, Oates* v. *Cannon*, 13 O.R. 705, and it has been held that the conveyance of property either voluntarily or for value, which the grantor has previously conveyed by a deed, voidable in equity, is not void on the ground of champerty; and that the right of instituting a suit to set aside the previous voidable deed passes to the grantee: *Dickinson* v. *Burrell*, 1 Eq. 337. In that case the grantor after making the voidable deed, executed a voluntary settlement of the property in trust for himself for life, with remainder to such children as he should appoint and in default of appointment for all his children, and it was held that the children were entitled to maintain a suit to set aside the voidable deed.

So also assignments by trustees in bankruptcy of *choses in action* of the bankrupt though in litigation to a purchaser for value or to a creditor, and though made for enabling the assignee to carry on the litigation for his own benefit, or for the benefit of himself and others, are not void on the ground of maintenance: *Seear* v. *Lawson*, 15 Chy.D. 426; *Guy* v. *Churchill*, 40 Chy.D. 481. A party prosecuting his claim to a fund in Court, and to which he was ultimately found entitled, mortgaged it *pendente lite* to enable him to carry on his claim, and the mortgage was held to be valid and not to savour of champerty or maintenance: *Cockell* v. *Taylor*, 15 Beav. 103.

Where unlawful maintenance has been practised the party injured has, as we have said, a right of action against the unlawful maintainer for the injury he has sustained, and where the injured party has succeeded in the action unlawfully maintained, he will be entitled to recover against the unlawful maintainer all the costs that he has been put to: *Bradlaugh* v. *Newdegate*, 11 Q.B.D. 1; and see *Harris* v. *Briscoe*, supra; but as we have already seen, the fact that the action is being unlawfully maintained by some third party, does not of itself constitute a defence to the action; see *Elborough* v. *Ayres*, 10 Eq. 267; nor yet does the fact

of the existence of a champertous agreement between the plaintiff and his solicitor: *Hilton* v. *Woods*, 4 Eq. 432. Where, however, it appears that the plaintiff's right is derived under a champertous agreement, it will, as we have already seen, be held invalid, and the Courts will refuse to give effect to the right of the plaintiff so derived as against the defendant in the action: *Muchall* v. *Banks*, 10 Gr. 25; *Little* v. *Hawkins*, 19 Gr. 267; *Wigle* v. *Setterington*, Ib. 512; *Hilton* v. *Woods*, 4 Eq. 432; *Re Cannon, Oates* v. *Cannon*, 13 O.R. 70; and will also refuse to enforce any such champertous agreement as between the parties to the agreement: *Kerr* v. *Brunton*, 24 U.C.Q.B. 390; *Carr* v. *Tannahill*, 30 U.C.Q.B. 217; *Hutley* v. *Hutley*, L.R., 8 Q.B. 112. A solicitor who procured money from his client for the purpose of corruptly influencing a jury before whom the client was to be tried for a criminal offence, which, as we have seen, constitutes that species of maintenance called embracery, was struck off the rolls: *Re Titus*, 5 O.R., 87.

Owing to the secret nature of agreements for maintenance, it is generally somewhat difficult for the party injured to get at the facts on which his right of action depends, because even if he recovers judgment for costs in the action unlawfully maintained, it is not open to him to bring the execution debtor up for examination: *Majors* v. *Kendrick*, 9 P.R. 363; *Fiskin* v. *Troutman*, C.P.D., 20th June, '89 (not reported), *sed vide Re Irwin*, 12 P.R. 297; but where it is suspected that unlawful maintenance has been practised, it would seem an action could be brought against the suspected maintainer, in which the plaintiff in the original action might either be made a co-defendant for the purpose of discovery, see *Wallis* v. *Duke of Portland*, 3 Ves. 492, or he might, perhaps, without being made a defendant, upon an interlocutory application, be ordered to attend to be examined for discovery: *McMaster* v. *Mason*, 12 P.R. 278; *Smith* v. *Clarke*, 12 P.R. 217; *Turner* v. *Kyle*, 18 C.L.J. 403; *Hendrie* v. *Neelon*, 2 C.L.T. 599; *Megaw* v. *McDiarmid*, 10 L.R. Ir. 376: Rule 566. It is not, however, without doubt that the latter course can be adopted, as it has been held in England that the attendance of a third party for examination or to produce documents can only be ordered for the purpose of a particular motion or proceeding: *Central News Co.* v. *Eastern Telegraph Co.*, 76 L.T.Jor. 242; and see *Rosenheim* v. *Silliman*, 11 P.R. 7.

Where the action unlawfully maintained has succeeded, it does not appear that the defendant in the action could recover substantial damages against the unlawful maintainer, as it would be a case of *damnum absque injuria*.

Correspondence.

THE CENTRAL BANK CASE.

To the Editor of THE CANADA LAW JOURNAL:

Dear Sir,—I wish to express the satisfaction I have found in the examination of the decision of Mr. Hodgins, Q.C., Master-in-Ordinary, in the case of the *Central Bank of Canada*, published in your issue for May 1st. I have often found that the opinion written by the judge of first instance, so to speak, was better studied and intrinsically more valuable than that afterwards written in the Court of Appeal. I cannot avoid thinking that more attention to Canadian decisions by our own judges and lawyers would result in an improvement of our own jurisprudence.

Very respectfully yours,
SEYMOUR THOMPSON.

St. Louis, Mo., June 29, 1889.

COURT DRESS.

To the Editor of THE CANADA LAW JOURNAL:

Dear Sir,—In the County of Huron the judges have laid down a rule that barristers who appear in court before them shall wear the court dress. Can an attorney appear before them with white tie and gown? This is done by an attorney in our county at the sittings of the court in his town. Can the Law Society prevent his doing this?

INQUIRER.

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

EASTER TERM, 1889.

The following gentlemen were called to the Bar during the above term, viz.:

May 20th.—John Franklin Palmer, David Fiske Macmillan, Samuel Hugo Bradford, Isaac Benson Lucas, James Alexander Macdonald, John Alexander Chisholm, Ernest Merrick Lake, Arthur George Browning, Edward Peel McNeill, Hume Blake Cronyn, Charles Duff Scott, Herbert Read Welton, Thomas Alfred Rowan, Alexander McLean Macdonell, Charles Swabey, Alfred David Creasor, James Frederick Edgar, Edward Herbert Ambrose, Andrew Leslie Baird, Sydney Chilton Mewburn, William John Lockwood McKay, Thomas Edward Parke, Hugh Mackenzie Cleland, Horace Harvey.

May 25th.—Frank Reid.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz.:

May 20th.—W. Greene, R. J. McLaughlin, J. A. Macdonald, E. P. McNeill, A. Henderson, C. Swabey, H. Harvey, R. O. McCulloch, J. F. Edgar, W. C. Fitzgerald, W. H. Irving, J. A. McLean, G. J. Smith, S. R. Wright, W. L. Beale, G. Martin.

May 21st.—J. T. Kirkland, H. R. Welton.

May 25th.—R. R. Hall, A. L. Baird, G. A. Loney, G. H. Douglas.

May 31st.—E. M. Lake, A. G. Browning, A. M. Macdonell.

June 8th.—J. I. Poole, I. B. Lucas, S. H. Bradford, F. J. Roche.

June 25th.—H. B. Cronyn.

The following gentlemen passed the Second Intermediate Examination, viz.:

N. W. Rowell, with honors, 1st scholarship; T. D. Law, with honors, 2nd scholarship; E. Bayley, with honors, 3rd scholarship; W. H. Murray, C. W. Kerr, W. J. Fleury, and J. Reeve, with honors; and Messrs. H. Chatelain, W. A. Logie, A. G. Smith, D. Fenton, A. Abbott, A. A. Adams, J. D. Lamont, M. K. Cowan, C. J. Notter, W. Mackay, D. Holmes, M. J. Routhier, J. R. L. Starr, W. York, A. J. Keeler, N. Mackenzie, J. W. Evans, D. R. McLean, R. A. Montgomery, C. Elliott, J. W. Mealey, J. W. McColl, C. E. Oles, F. W. Maclean, D. Grant, J. W. Morrice, A. C. Paterson, W. A. Smith, H. W. Steward, A. H. Wallbridge.

The following gentlemen passed the First Intermediate Examination, viz.:

W. Stewart, with honors, 1st scholarship; G. D. Minty, with honors, 2nd scholarship; H. Langford, with honors, 3rd scholarship; J. E. Jones, W. A. Leys, E. F. Blake, E. N. Livingston, with honors; and Messrs. W. S. Middlebro, J. Hales, A. W. Ballantyne, J. A. Taylor, G. F. Downes, J. B. McLeod, H. B. McGiverin, J. S. Denison, C. F. Maxwell, A. U. Bain, J. Steele, W. F. Hull, R. T. Harding, F. A. Hough, H. J. D. Cooke, Z. Gallagher, S. King, J. F. Carmichael, R. B. Henderson, T. A. Gibson, E. G. Fitzgerald, B. E. Swayzie, W. A. Boys, J. N. Anderson, W. J. Clarke, J. E. Cooke, F. Elliott, G. Waldron, F. C. Jones, E. Mortimer, W. E. Burritt, R. B. Revell, U. A. Buchner, M. O. Sheets, W. M. McKay, J. W. Winnett.

The following gentlemen were entered on the books of the Society as Students-at-Law, viz.:

Graduates.—Charles Howard Barker, Bronte Melbourne Aikens, Peter Secord Lampman, James Craig Cameron, John McKay, Edward Scott Griffin, Ralph Manson Lett, John Henry Madden.

Matriculants.—Thomas Wesley Evans, Arthur Holman.

Juniors.—James Turner Scott, William Nassau Ferguson, Frederick Langmuir, Thomas Richard Beale, Henry Edward Price, William Archibald Hutchison, William Douglas, Trevor Hugo Grout, James Archibald Hunter, Ellis Hughes Cleaver, Albert Mearns, John Thomas Loftus, Alfred Edwin Bull, Frederick Hamilton Coulter, David Irving Sicklesteel, William Alexander Lewis, George Shepherd Bowie, William Tyndall Gray, James Kenneth McLennan,

Ward Stamworth, William Morley Punshon Whitehead, Samuel Simpson Sharp, Allan McLennan, Matthew Henry East, Daniel Smith, John Joseph McCready, William Pattison Telford, Augustus Noverre Middleton, Frederick George Anderson, William F. W. Lent, Oliver Hugel Mabee, Charles Edward Williams, John Ernest Primeau, Thomas Ernest Godson, George Johnston Ashworth, Alexander Garrett, and John Agnew Stevenson.

Articled Clerk.—John Percival White.

The following gentlemen were entered on the books on the last Tuesday in June, as Students-at-Law in the graduate class, under the provisions of the Rule in that behalf, viz.:

George Coltman Biggar, William Cross, John Henry Moss, John Henry Rodd, Edwin Goodman Rykert, John Harold Senkler, John David Macdonald Spence, William Benjamin Taylor, Michael Joseph O'Connor.

The following is a *résumé* of the proceedings of Convocation during Easter Term:

MONDAY, May 20, 1889.

Convocation met.

Present: Sir Adam Wilson, and Messrs. Britton, Cameron, Ferguson, Hoskin, Irving, Kerr, Kingsmill, Lash, Murray, and Shepley.

In the absence of the Treasurer, Mr. Irving was appointed chairman.

The minutes of last meeting were read and approved.

Mr. Shepley, on behalf of the Special Committee to frame draft rules on the subject of the Law School, presented their report, which was received, read, and the appointment of a time for the consideration of the report was deferred until to-morrow.

The petition of Messrs. Morrison and others relating to the case of L. U. C. Titus was read.

Ordered that the petitioners be informed that Convocation can take no action in the matter.

Mr. Shepley gave notice

1. That he will to-morrow move that section 12, rule 29, be amended by inserting between the words "libraries" and "to be supplied" the words "and one copy for each solicitor who has taken out his certificate."

2. That he will move to-morrow that the Order of Proceedings be amended by inserting after the order "communications" an order under the name of "inquiries."

Mr. Murray presented the report of the Finance Committee relating to the laying of the walks in accordance with the proposals of the Consumers' Gas Company, at $2 per superficial yard, with Bryce's patent asphalt pavement.

Ordered that it be referred back to the Committee to report upon the position of the matter between the Law Society and the Gas Company, and further to report on the best method of securing a permanent and suitable pavement.

TUESDAY, May 21, 1889.

Convocation met.

Present: Messrs. Beaty, Bruce, Cameron, Foy, Hardy, Hoskin, Hudspeth, Irving, Kerr, Kingsmill, Martin, Meredith, Murray, and Shepley.

In the absence of the Treasurer, Mr. Irving was appointed chairman.

The Secretary read the report of the Examiners on the First and Second Intermediate Examinations, and also his report on the standing of the candidates.

Ordered that so much of the report as refers to the question of honors and scholarships be referred to a Special Committee, composed of Messrs. Bruce, Foy, and Kingsmill, for examination and report.

Ordered that Thursday, 30th May, be appointed for the consideration of the report of the Special Committee on the subject of the Law School, and that a call of the Bench be made for that day.

Mr. Martin presented the annual report of the County Libraries Aid Committee, which was received, read, considered and adopted.

Ordered that Mr. Winchester, the Inspector of the County Libraries, be paid the sum of fifty dollars for his work for the first year, in addition to the sum of one hundred dollars already paid to him.

Ordered that in accordance with the recommendation contained in the report of the County Libraries Aid Committee, Mr. Winchester be re-appointed Inspector for the ensuing year, and that he be paid one hundred and fifty dollars for his services during such year.

The Secretary read a letter of Mr. F. H. Keefer.

Ordered that the letter and papers connected therewith be referred to the Discipline Committee for report.

Mr. Martin gave notice

That on the 31st May, inst., he would introduce a rule to amend section 24 of rule relating to County Libraries so as to permit the payment of two-thirds of the salary of the librarian and one-half of the charge for telephone service of County Associations, the members of which do not exceed one hundred in number. Provided that in no event shall more than two hundred dollars be paid to any library association for librarian's salary and telephone service.

Mr. Bruce from the Special Committee entitled to deal with the report of the examiners on the first and second intermediate honor examinations, presented their report:

That W. Stewart, G. D. Minty, H. Langford, J. E. Jones, W. A. Leys, E. F. Blake, and E. N. Livingston are entitled to be passed with honors in the first intermediate examination, and that W. Stewart is entitled to the first scholarship of one hundred dollars, G. D. Minty to the second scholarship of sixty dollars, and H. Langford to the third scholarship of forty dollars.

That N. W. Rowell, T. D. Law, E. Bayley, W. H. Murray, C. W. Kerr, W. J. Fleury, and J. Reeve are entitled to be passed with honors in the second intermediate examination, and that N. W. Rowell is entitled to the first scholarship of one hundred dollars, T. D. Law to the second scholarship of sixty dollars, and E. Bayley to the third scholarship of forty dollars.

A. BRUCE, *Chairman.*

The report was adopted and ordered accordingly.

Mr. Shepley, seconded by Mr. Murray, moved that section 12, rule 29, be amended by inserting between the words "libraries" and "to be supplied" the words "and one copy to each solicitor who has taken out his certificate."

Ordered that the subject be referred to a Special Committee, consisting of the Chairmen of the Finance and Reporting Committees and Mr. Shepley, to report on the subject generally.

Mr. Osler's notice of motion was ordered to stand until Friday, 31st inst.

SATURDAY, May 25, 1889.

Convocation met.

Present: Sir Adam Wilson, and Messrs. Cameron, Hoskin, Irving, Mackelcan, Martin, Morris, Moss, Murray, Osler, Robinson, and Smith.

In the absence of the Treasurer, Mr. Irving was appointed chairman.

The minutes of last meeting were read and approved.

Mr. Hoskin, seconded by Mr. Moss, moved that Mr. Edward Blake, Q.C., be re-elected Treasurer of the Law Society of Upper Canada.—*Carried.*

Mr. Hoskin mentioned the letter of Mr. Read to Mr. Irving on the subject of his recent work, "The Lives of the Judges."

Ordered that the subject be deferred until next Friday, when the Secretary will lay all the information before the Convocation.

Mr. Hoskin brought up a communication from Miss Cameron of the telephone and telegraph office, and moved, seconded by Mr. Osler, that she should be paid the sum of $540 annually, such increase to commence from the First day of April, 1889.—*Carried.*

Mr. Osler presented the report of the Reporting Committee, which was received, read and adopted.

Ordered that the standing committees for the ensuing year be composed of the same members as the standing committees for the past year consisted of at the beginning of this term, except that the name of Sir Adam Wilson be added to the Reporting Committee.

Mr. Moss from the Legal Education Committee presented the report on the Primary Examination.

The report was read, adopted, and ordered accordingly.

The Secretary read the letter of Messrs. Macdonald and Dignam, enclosing a copy of the *London Free Press* of 21st March, 1889.

The Secretary having acknowledged the letter, no further action was ordered.

THURSDAY, May 30, 1889.

Special meeting of Convocation *re* Law School Rules.

Present: Sir Alexander Campbell, Sir Adam Wilson, and Messrs. Beaty, Bell, Britton, Bruce, Cameron, Foy, Hardy, Hoskin, Irving, Kingsmill, Lash, Mackelcan, Martin, Meredith, Murray, Purdom, Robinson, Shepley, and Smith.

In the absence of the Treasurer, Mr. Irving was appointed chairman.

The Secretary read the order of Convocation of the 21st inst., that this day be appointed for the consideration of the report of the Special Committee on the

subject of the Law School, and that a call of the Bench be made for this day, the notices of meeting to state the subject to be considered, and no other business to be taken up.

Mr. Martin presented the report of the committee, which was received and read.

Ordered that it be considered clause by clause.

The report was then read, considered, and amended.

The report as amended was adopted.

Mr. Martin introduced a rule, founded on the report, to give effect to it in the same language as that contained in the report.

The repealing clause was added as to the rules inconsistent with those recommended by the report.

The rules were then read a first and second time, as contained in pages 37 to 61 of the new consolidated rules.

Mr. Lash, seconded by Mr. Mackelcan, moved the suspension of the rule as to third readings, and moved that the rules be read a third time.—*Carried unanimously.*

The rules were read a third time and passed.

Mr. Meredith, seconded by Dr. Smith, moved to amend rule 3, section 3, by striking out the words, "other than that of student in attendance," and substituting therefor the words, "inconsistent, or interfering with his duties as such student," and by striking out the words, "other than that of," in the 8th line, and substituting therefor the words, "inconsistent, or interfering with his duties of."

Mr. Shepley moved, seconded by Mr. Mackelcan, to amend rule 3, section 3, as follows:

No person attending in the Chambers of a barrister in pursuance of section 3 of these rules shall, during his time of attendance, hold any office or emolument, or engage or be employed in any occupation whatever other than that of student in attendance, and no person bound by articles of clerkship to any solicitor shall, during the term of service mentioned in such office, hold any office of emolument, or engage or be employed in any occupation whatever other than that of clerk to such solicitor or his partner or partners, if any, and his Toronto agent, with the consent of such solicitors, in the business, practice, or employment of a solicitor.

Mr. Shepley's amendment was carried on the following division:

Yeas—Bruce, Martin, Shepley, Lash, Foy, Mackelcan.

Nays—Meredith, Purdom, Smith.

The rules as amended on the third reading were carried.

Ordered that the rules come into operation immediately for purposes of organization, but as far as students are concerned not till Trinity Term, with an examination for admission of students in Michaelmas Term.

It was further ordered that the minutes of this meeting be submitted for approval to Convocation at the regular meeting of Convocation on 8th June next, instead of at the meeting of 31st May.

FRIDAY, May 31, 1889.

Convocation met.

Present: Sir Adam Wilson, and Messrs. Cameron, Ferguson, Hoskin, Irving, Kerr, Kingsmill, Meredith, Murray, and Shepley.

In the absence of the Treasurer, Mr. Irving was appointed chairman.

The minutes of meeting held on Saturday, May 25th, were read and approved.

Ordered that a committee be appointed to report whether it will be necessary to erect a special building for the accommodation of the Law School, and also to report upon the propriety of erecting therewith consultation chambers, for such members of the Society as may desire to rent the same.

Convocation appointed as the committee Messrs. Moss, Osler, Robinson, Meredith, Shepley, Kingsmill, Hoskin, and Martin.

Mr. Shepley presented the report of the Committee on Supreme Court Reports, which was adopted, and is as follows:

The Special Committee appointed (21st May) by Convocation to enquire and report to Convocation on the desirability of furnishing the Supreme Court Reports to the profession, beg to report that after enquiry the Committee is of opinion that it is not practicable to furnish these reports. The Committee, however, is of opinion and would recommend that some inexpensive and convenient means be devised by which the practitioner may find within the limits of our own reports what the final result has been of cases in our own courts carried to the Supreme Court or Privy Council, and the Committee recommend that it would be an instruction to the Reporting Committee to devise such means and carry the same into effect at the earliest possible date.

May 31st, 1889. (Sgd.) G. F. SHEPLEY.

Mr. Murray, from the Finance Committee, presented a report on the pavement to be laid in the grounds. The report was read, considered, and referred back to the committee to re-consider whether a five years' guarantee can be obtained from the Gas Company, and also to ascertain the cost of paving with flags and of a wooden pathway, and to obtain such other information as may be deemed desirable by the committee to lay before Convocation.

Ordered, that the "Order of Proceedings" be amended by inserting after the word "communications" an order under the name of "enquiries."

Mr. Shepley gave notice for Saturday, 8th June, that he would introduce a rule amending such rules of the Society as it is desirable should be amended by reason of and in accordance with the rules passed yesterday, the proposed amendments being shown by the report of the Special Committee for drafting rules relating to the Law School, which was adopted yesterday, and that the rules be suspended so that such rule as may be adopted shall be passed through all its stages.

Mr. Osler gave notice that he would move to alter the rule in so far as fixing the amount of the salary of the Principal of the Law School is concerned, and also that the terms of the occupations open to the Principal be reconsidered.

Mr. Meredith moved, seconded by Mr. Kerr, That it be referred to the Legal Education Committee to consider and report as to the appointment of the staff of the Law School, with power to advertise for applicants for the positions therein, such committee to report to Convocation at its next meeting, and that a call of the Bench be made for the 19th June to make the appointments.

Mr. Osler moved, seconded by Mr. Hoskin, That if one hundred copies of Mr. Read's "Lives of the Judges" can be obtained by paying two dollars a copy to Mr. Read, and fifty cents a copy to the publishers, they be purchased, and that two copies be given to each of the County Law Libraries, and that the balance be reserved for distribution as prizes in connection with the Law School.

Sir Adam Wilson gave notice of motion for the reconsideration of new rule 21 as number 3 sub-section of section 3, as amended on 30th May, so as to make it conform to the Ontario Act—R.S.O., 1887, c. 146, s. 6, ss. *a*.

SATURDAY, June 8, 1889.

Convocation met.

Present: Sir Adam Wilson, and Messrs. Cameron, Foy, Irving, Kingsmill, Lash, Mackelcan, Martin, Meredith, Morris, Moss, Murray, Osler, Robinson, Shepley, and Smith.

Mr. L. W. Smith was appointed chairman, in the absence of the Treasurer.

The minutes of meetings held on the 30th and 31st of May were read and approved.

Dr. Lash, from the Legal Education Committee, presented the following report:

That pursuant to the resolution of Convocation, they have considered as to the appointment of the staff of the Law School, and as to advertising for applications for positions therein.

1. The Committee are of opinion that it would be advisable to advertise for applications for the office of Principal, and they submit herewith the form of advertisement for that purpose.

2. The Committee think that until a detailed scheme for the working of the Law School has been framed, it would be advisable to defer the appointment of lecturers, and as examiners will not be required before May next, the Committee think that it is unnecessary to advertise for applicants at present.

3. The Committee further recommend that the first duty of the Principal be to prepare and submit to the Legal Education Committee a scheme not inconsistent with the rules of the Law Society providing for the proper working of the Law School, and the carrying out of the rules relating thereto.

4. The Committee further recommend that the provision of the rule requiring the Principal to devote his whole time to the duties of his office be modified to the effect that he shall engage in no professional work other than that of a consulting and chamber counsel, and that he be required to reside in or near Toronto.

June 6th, 1889. Z. A. LASH, *Chairman.*

The report was received, read and considered, clause by clause. Clauses 1, 2 and 3 were carried; clause 4 stands.

The report of the lecturers on the Law School for 1888-89 was received. No action taken.

Mr. Murray presented the report of the Finance Committee on pavements.

Ordered that the offer of the Consumers' Gas Company to lay the pavement recommended in the second report of the Finance Committee, if the Gas Company will give a five year guarantee, be accepted.

A letter from the Treasurer acknowledging his re-election was read.

A letter from the Treasurer in the matter of the Crooks Monument memorial enclosing one from Mr. Howland, was read, and the Secretary was directed to reply that the Society, having no armorial bearing, Convocation is unable to comply with the request.

A letter from Mr. Tully, of 29th May, to the chairman of the Finance Committee was read.

Ordered that the Secretary see Mr. Tully on the subject of the danger of the ceiling falling in the library, and obtain repairs.

A letter from J. A. Davidson, Secretary Perth Law Association, of 3rd June, read and referred to County Libraries Aid Committee.

Mr. Martin, seconded by Mr. Osler, moved

That section 23 of the rules relating to County Libraries be amended by striking out the words, "and Convocation may authorize," and all following words, and substituting therefor the following:

"And Convocation may authorize the payment of such proportion not more than two-thirds of the charges for telephone service of any County Association, the members of which do not exceed one hundred in number, provided that the amount to be paid in respect to such service to any County Association shall not in any case exceed in the whole two hundred dollars per annum. Provided that an allowance not to exceed two hundred dollars per annum may be made to any County Association, although the number of its members exceed one hundred. Provided further that no allowance shall be made to any Association unless the same be reported on satisfactorily by the Inspector."—*Carried on a division.*

Mr. Meredith, for Sir Adam Wilson, moved for the reconsideration of new rule 21, as number 3, sub-sec. of sec. 3, as amended on 30th May, so as to make same conform to the Ontario Act, R.S.O., 1887. c. 147, s. 6, ss. *a*.

The motion was lost.

Mr. Osler, seconded by Mr. Martin, moved,

To alter the rule in regard to the salary of the Principal—to increase the salary to four thousand dollars.—*Carried.*

Ordered that the provisions of the rule requiring the Principal of the Law School to devote his whole time to the duties of his office, be modified to the effect that he shall engage in no professional work other than that of consulting counsel, nor shall he be a member of any firm of practising barristers or solicitors, and that he be required to live in or near Toronto.

Clause 4 in the report of the Legal Education Committee was amended as above and with this substitution, the report as amended was adopted.

Mr. Shepley, seconded by Mr. Osler, moved for leave to introduce the following rule:

Any person who having entered the Society as a student-at-law, has proceeded regularly to the degree of barrister-at-law, and who thereafter serves under articles for the full term, during which he would, if an articled clerk, only have required to serve, shall, upon completing these articles and petitioning under these rules for a certificate of fitness, be entitled to have allowed him the intermediate examinations passed by him when proceeding to the degree of barrister-at-law. (Before rule 190.)

The rule was introduced, leave being granted.

Ordered that the rule be now read a first and second time.

Mr. Shepley moved that the rule be now read a third time.

Ordered that the rule be now read a third time and passed.

Mr. Osler from the Special Committee on increased building accommodation for the Law School and for consultation chambers, reported as follows:

That it is probable that a new building will be required, but that further action on the matter ought to be deferred until after the Principal has reported upon the accommodation required.

June 8th, 1889. B. B. OSLER, *Chairman.*

Ordered that the rules as consolidated, including the rule just passed, be read a first and second time.

Mr. Shepley, seconded by Mr. Lash, moved that the rules as consolidated be read a third time and passed.—*Carried unanimously.*

Ordered that the rules as consolidated be read a third time and passed.

WEDNESDAY, June 19, 1889.

Convocation met in pursuance of a special call of the Bench, ordered 31st of May last.

Present: Messrs. Beaty, Bell, Bruce, Britton, Cameron, Ferguson, Foy, Guthrie, Hardy, Hoskin, Irving, Kerr, Lash, McCarthy, Martin, Meredith, Morris, Moss, Murray, Osler, Robinson, and Shepley.

In the absence of the Treasurer, Mr. Irving was appointed chairman.

The minutes of the last meeting were read and approved.

The Secretary read the resolution of Convocation, appointing this day to consider the appointment of the Principal of the Law School.

It was then resolved, That the position of Principalship of the Law School be offered to Mr. Justice Strong, and that the resolution of Convocation, with memorandum of terms, be communicated to Mr. Justice Strong, and that it be intimated to him that as Convocation will meet on Tuesday 25th inst., it is necessary to have a reply before that date.

It was further resolved, That the further consideration of the appointment of Principal be adjourned to that day.

Mr. Shepley gave notice that he would, at the half-yearly meeting on Tuesday, move that so much of the rules passed on the 8th June, inst., as relate to examinations be suspended until the end of next Trinity Term, and that Primary Examination be held prior to next Michaelmas Term as heretofore, and that he will move the suspension of the 21st rule for that purpose.

Ordered that the Visitors of the Society be invited to attend the half-yearly meeting of Convocation on Tuesday next at 12.30 p.m., for the purpose of giving their approval to the rules passed on 8th June, inst., and that in the meantime the Secretary forward a copy of the rules to each of the Visitors.

Mr. Cameron gave notice that on next Tuesday the question of the salaries of the lecturers be reconsidered.

TUESDAY, June 25, 1889.

Convocation met.

Present: Messrs. Beatty, Ferguson, Foy, Irving, Kingsmill, Lash, Mackelcan, Martin, Meredith, Morris, Moss, Murray, and Shepley.

In the absence of the Treasurer, Mr. Irving was appointed chairman.

Sir Thomas Galt, Mr. Justice Ferguson, Mr. Justice Robertson, and Mr. Justice Maclennan, as Visitors of the Society, attended Convocation in order to confer with the Benchers on the subject of the new rules, to which they gave their assent.

The minutes of last meeting of Convocation were read and approved.

The Secretary read the report of the Legal Education Committee on the admission of graduates as of Easter Term, 1889.

The report was adopted.

Ordered that the graduates therein named be entered on the books of the Society as students-at-law of the graduate class as of the first day at Easter Term, 1889.

Mr. Justice Strong having declined the position of Principal of the Law School, which had been offered him,

Mr. Martin moved, seconded by Mr. Mackelcan, That Convocation proceed to appoint a Principal for the Law School on Wednesday, 3rd July, 1889; that a call of the Bench be made for that day, and that in the notice to Benchers it be mentioned that Mr. Justice Strong had declined the position.—*Carried.*

Ordered, that so much of the rules passed on the 8th June instant as relate to examinations be suspended until the end of next Trinity term, and that primary examinations be held prior to next Michaelmas term as heretofore.

WEDNESDAY, July 3, 1889.

Convocation met.

Present: Messrs. Bell, Britton, Bruce, Cameron, Ferguson, Hardy, Irving, Lash, Mackelcan, Martin, Meredith, Morris, Moss, Murray, Purdom, Shepley, and Smith.

In the absence of the Treasurer, Mr. Irving was appointed chairman.

The minutes of last meeting were read and approved.

The Secretary read the order of Convocation of the 25th June last directing that a call of the Bench be made for the 3rd July in order to appoint a Principal for the Law School, the Hon. Mr. Justice Strong having declined the appointment.

Convocation then proceeded to consider the appointment of the Principal of the Law School.

Mr. W. A. Reeve, Q.C., was elected Principal of the Law School.

Ordered, that the Finance Committee be authorized to pay the travelling expenses of the Principal to be incurred in visiting such places in New York and Massachusetts, or such other places as may be deemed desirable, for the purpose of acquiring information on the Law School systems adopted at those places.

Convocation being of opinion that it is most desirable that Convocation should have the benefit of the opinion of Messrs. Martin and Moss upon the working of the Law Schools which the Principal is requested to visit, it is ordered that they be requested to accompany the Principal, if it suits their convenience.

It is further directed that their expenses be defrayed by the Law Society.

Ordered, that the salary of the Principal begin on the 1st July instant, and that he be required to conduct such duties relating to the examination of candidates as may be necessary until other arrangements are made in respect of examiners, and that the duty to be discharged by him as such examiner shall not entitle him to other salary than that allowed to him as Principal.

Ordered, that Convocation do meet for Trinity term on Monday, the 2nd day of September, and for the two weeks then ensuing, notwithstanding Rule 6, and that the Secretary do issue notices to that effect to members of Convocation.

Convocation adjourned.

DIARY FOR AUGUST.

1. Thu.....Slavery abolished in British West India Islands, 1838.
3. Sat.....Last day for notices for Primary Exam.
4. Sun.....*Seventh Sunday after Trinity.*
6. Tue.....Thomas Scott, 4th C.J. of Q.B., 1860.
11. Sun.....*Eighth Sunday after Trinity.* Battle of Lake Champlain, 1814.
13. Tue.....Primary Exam. Sir Peregrin Maitland, Lieut.-Governor, 1799.
14. Wed.....Battle of Fort Erie, 1814.
15. Thu.....Admission of graduates and matriculants.
17. Sat.....Last day for filing papers and fees for Final Examination.
18. Sun.....*Ninth Sunday after Trinity.*
20. Tue.....First Intermediate Examination.
22. Thu.....Second Intermediate Examination.
24. Sat.....St. Bartholomew.
25. Sun.....*Tenth Sunday after Trinity.*
26. Mon.....Trinity Term begins.
27. Tue.....Solicitors' Examination.
28. Wed.....Barristers' Examination.

Reports.

ONTARIO.

MUNICIPAL LAW.

[Reported for the CANADA LAW JOURNAL.]

Re KINGSTON, SMITH'S FALLS AND OTTAWA RAILWAY AND THE TOWNSHIP OF BASTARD AND BURGESS SOUTH.

Scrutiny of votes—Powers of County Court judge—Municipal Act, secs. 320, 323, 326—Decision as to specific ballots.

On an application under secs. 320 and 323 and following sections of the Municipal Act, in respect of the by-law for granting aid by way of bonus to the Kingston, Smith's Falls and Ottawa Railway Company from the Township of Bastard and Burgess South, it was

Held, that the powers of a County Court Judge under the provisions of section 320, sub-section 2, and sections 323, 324, 325, and 326 of the Municipal Act are limited to an inspection of the ballot papers, and to ascertaining who are and who are not entitled to vote, and, as a result of such inspection and ascertainment, to determining whether the by-law has or has not been carried. For decision as to specific ballots see judgment.

[MACDONALD, Co.J., BROCKVILLE.

On the 15th April, 1889, Mr. E. J. Reynolds of counsel for Thomas H. Percival, a duly qualified voter, filed with the judge of the County Court of the united counties of Leeds and Grenville the petitions and affidavits, and the said Percival entered into the recognizance required by section 323 of the Municipal Act, and application was thereupon made to the said judge for a scrutiny of the ballot papers and a determination of the questions in connection with a vote of the electors of the township of Bastard and Burgess South in the County of Leeds upon a by-law for granting aid by way of bonus to the Kingston, Smith's Falls, and Ottawa Railway Company.

On the 29th April, 1889, at Delta, in the said township, the said judge entered into the scrutiny and determining the dispute under sections 320 and 323 and following sections of the Municipal Act.

Owing to an error made by the deputy returning officer for polling sub-division No. 5, there were 88 votes counted for the by-law and 8 against. The numbers should have been reversed. Certain ballots were objected to upon both sides, and it appeared that in one polling sub-division the deputy returning officer, instead of putting his initials on the back of the ballots, merely put the initial of his surname. Allowing these in the meantime the vote was ascertained to have been 250 for the by-law and 235 against it.

An inspection or scrutiny of the voters' list was then entered upon to ascertain how many persons were qualified to vote. It was conceded on both sides that 589 persons were so qualified, and the petitioner claimed there were 30 more. The right of these 30 was questioned by the Railway Company.

The proceedings were adjourned, and on 10th May, 1889, argument was had at Brockville.

E. J. Reynolds for the petitioner.—Some of the ballots objected to may be valid; but those upon which the deputy returning officer merely put the initial of his surname cannot be counted, see sec. 143, sub-sec. 6, secs. 144, 146, 152, and 163, sub-sec. 8 (d) and sub-sec. 4. Also *Jenkins* v. *Breckin*, 7 Sup. Court 258; *Mills* v. *Hawkins*, 8 Sup. Court 696, and *East Hastings Case*, *Hodgin's Election Cases*, 764. As to the powers of the judge upon the scrutiny see *Re Canada Temperance Act*, *G. Ontario Reports 161*, 12 Appeal 677, and *Chapman* v. *Rand*, 11 Sup. Court 312.

A person may be compelled to say how he voted, or at any rate a person who voted, and who, upon enquiry, is found not to have been entitled. Sec. 171 of the Municipal Act provides that a voter cannot be compelled to state for what *person* or *individual* he voted, and does not apply to a vote given on a by-law; at any rate it only applies to a lawful voter and not to an intruder who votes without right. Even if it

applies to a vote upon a by-law it does not prevent a person from stating of his own accord for whom he voted. See secs. 218 and 219 of this Act, and *Langdon* v. *Arthur*, 45 U.C.B.R. 47, see page 52.

Section 306 does not bring in section 171 or any other section not incidental to the taking of the votes.

In one polling sub-division only 6 votes were polled against the by-law ; any bad votes on the poll book over six in number must have been polled for the by-law and should be struck out.

J. L. Whiting for the Railway Company.—Probably the ballot with the straight mark and no cross ought to be rejected. All the others ought probably to be allowed. The ballots upon which the deputy returning officer merely put the initial of his surname ought under the decided cases to be allowed. He could identify the ballot as the one he gave to the voter, and the object of putting on the initials is such identification. Even if there was an irregularity it is cured by section 175. As to powers of the County Judge the Legislature discriminated as to powers conferred, sec. 320, sub-sec. 3, sec. 335. Sections 323 to 326 are all under the head of "scrutiny" and controlled by that term, *Wood* v. *Hurl*, 28 Grant 146. The meaning of secs. 323, 324, and 325, and the jurisdiction of the judge has been decided by *Chapman* v. *Rand*, 11 Sup. Court, 312. See Canada Temperance Act, secs. 61, 62 and 63. No hardship arises in this case as might under the Canada Temperance Act, as the Legislature has made provision for application to quash by-laws. Although apparently sec. 326 gives further power to the judge, in reality it does not, and that section must be controlled by the three previous sections. The meaning is that any incidental powers as to allowing costs or such like powers as the judge would have upon a trial of the validity of the election of a member of a municipal council he has in such a case as this. Sec. 171 does apply.

MCDONALD, C.J.—Upon a consideration of the 2nd sub-section of sec. 320 and of secs. 323, 324, 325 and 326 of the Municipal Act, and of the authorities cited to me, I am of opinion that my powers are limited to an inspection of the ballot papers, to ascertaining who are and who are not entitled to vote for the by-law, and, as a result of such inspection and ascertainment, to determining whether the by-law has or has not been carried. In my judgment, the provisions of sec. 326 as to the powers and authority of the judge must be read in connection with the foregoing sections under the head of "scrutiny," and the limitation of them thereto or thereby is not at all a strained construction. In fact, the very insertion—I might say, repetition—of the words "upon the scrutiny" after the word "arising" appears to me to evidence an intention upon the part of the Legislature to impose the limitation which I find exists. I therefore merely consider the matters above mentioned as being those as to which I have jurisdiction, and as to them I adjudge as follows :

Polling Sub-division No. 2 :

Two ballots objected to, one for and one against the by-law. The cross upon each of these ballots is marked in a rough manner. I have not any doubt as to the honesty of the mark, and do not believe that the peculiar manner of making the cross was intended to lead to identification of the voter. I allow them.

Polling Sub-division No. 3 :

One ballot against the by-law objected to. There is a distinct cross in the compartment, and near it and within the same compartment, a cross hardly distinguishable, which possibly may have been made by the voter as a cross or mark, or which may be a mere mark in the paper as it came from the mill, or a mark upon it afterward accidentally made. But even if the two crosses were made by the voter, the vote was not thereby invalidated. See *Bothwell Election Case*, Supreme Court, vol. 8, and *Woodworth* v. *Sessions*, 10 L.R.C.P. 733 or 773.

Polling Sub-division No. 4 :

All the ballot papers objected to on the ground that the deputy-returning-officer did not put his initials upon them. He did put "P," the initial of his surname. I hold the ballots good.

Two votes for the by-law objected to, one on the ground that the voter made two crosses, the other on the ground that the mark made is not a cross. My decision in the case of the ballot objected to in Polling Sub-division No. 3 applies to the former, and the vote is allowed. As to the latter, I hold that the mark cannot be considered to be a cross, but must be held to be a straight line, and under the authority of the Bothwell case above cited, I disallow and strike off the vote.

Polling Sub-division No. 5 :

No ballots objected to.

The total number of votes cast for and against the by-law, as allowed by me, is then as follows :

		For.	Agst.
Polling Sub-division No.	1	135	6
" " "	2	20	48
" " "	3	4	72
" " "	4	82	21
" " "	5	8	88
Totals		249	235

making a majority of 14 in favor of the passing of the by-law.

Upon a scrutiny of the voters' list, there were allowed to be 589 persons entered thereon who had an undoubted right to vote upon the question of the passing of the by-law, and there were 30 so entered whose right to vote was questioned. Allowing that the 30 had a right to vote (which it is the interest of Mr. Percival to maintain), and adding them to the 589, we have 619 persons entitled to vote. The assent of two-fifths of all ratepayers who were entitled to vote, as well as of a majority of the ratepayers voting on the by-law, is required by the statute. Two-fifths of 619 would, as I make it, require 248 votes to secure the passing of the by-law. As 249 votes were given in its favor, the required proportion has been secured, and I do therefore determine that the majority of the votes given is for the by-law, and that the assent of two-fifths of all ratepayers who were entitled to vote has been given to the passing thereof, and that therefore the said by-law has been carried.

It was subsequently decided that each party should bear his own costs.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

GALARNEAU *et al. v.* GUILBAULT.

Title to bridge—Appeal R.S.C., c. 135, s. 29, (b)—38 Vict., c. 97—Statutory privilege to maintain toll bridge—Infringement—Damages.

By 38 Vict., c. 97, the appellants authorized to build and maintain a toll bridge on the river L'Assomption, at a place called Portage, were bound "if the said bridge should, by accident or otherwise, be destroyed, because unsafe or impassable, the said plaintiffs should be bound to rebuild the said bridge within the fifteen months next following the giving way of the said bridge, under penalty of forfeiture of the advantages to them by this Act granted; and during any time that the said bridge should be unsafe or impassable, they should be bound to maintain a ferry across the said river, for which they might receive the tolls."

The bridge was accidentally carried away by ice, but rebuilt and opened for traffic within fifteen months. During the reconstruction, although appellants maintained a ferry across the river, the respondent built a temporary bridge within the limits of the appellants' franchise and allowed it to be used by parties crossing the river.

In an action brought by the appellants' claiming $1,000 damages, and praying that respondent be condemned to demolish the temporary bridge, on an appeal to the Supreme Court it was

Held, 1st, That as matter in dispute related to the title of an immoveable, by which rights in future might be bound, the case was appeal'able. R.S.C., c. 135, s. 29 (b).

2nd, Reversing the judgment, of the court below, that the erection of the respondent's bridge and the use made of it as disclosed by the evidence in the case, was an illegal interference with appellants' statutory privilege, but as the bridge had since been demolished the court would merely award nominal damages, viz.: $50 and costs.

RITCHIE, C.J., and PATTERSON, J., dissenting.

Appeal allowed with costs.

M. E. Charpentier, solicitor for appellant.

McCouville & Renaud, solicitors for respondent.

EVANS *v.* SKELTON *et al.*

Lease—Accident by fire—Arts. 1053, 1627, 1629, C.C.

By a notarial lease the respondents (lessees) covenanted to deliver to the appellant (lessor) certain premises in the city of Montreal at the expiration of their lease "in as good order, state, etc., as the same were at the commencement thereof, reasonable tear and wear, and accidents by fire excepted."

The premises were used as a shirt and collar factory, and were insured, the lessees paying the extra premium, and having been destroyed

by fire during the continuance of the lease, the amount of the insurance money was received by the appellant.

Subsequently the appellant (alleging that the fire had been caused by the negligence of the respondents) brought an action against them for $9,084, being the amount of the cost of reconstructing and restoring the premises to good order and condition, less the amount received from the insurance. At the trial it was proved that respondents allowed the ashes of hard coal used in the premises to be put into a wooden barrel on one of the flats, but that slushy refuse, tea leaves, etc., were always poured into the barrel. The origin of the fire could not be ascertained.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (Appeal side), SIR W. J. RITCHIE, C.J., and TASCHEREAU, JJ., dissenting, that the respondents were not responsible for the loss under Art. 1629, c.c., as the fire in the present case was an accident by fire within the terms of exception contained in the lease.

Appeal dismissed with costs

Macmaster, Q.C., for appellant.

Lacoste, Q.C., for respondents.

SHAW *v.* CADWELL *et al.*

Partnership—Liability—Art. 1867, c.c.

Where one member of a partnership borrows money upon his own credit, by giving his own promissory note for the sum so borrowed, and he afterwards uses the proceeds of the note in the partnership business of his own free will without being under any obligation to, or contract with, the lender so to do, the partnership is not liable for said loan. Art. 1867, c.c. *Maguire* v. *Scott*, 7 L.C. Rep. 451, distinguished.

Appeal dismissed with costs.

Robertson, Q.C., and *Falconer* for appellant.

Geoffrion, Q.C., and *Carter* for respondent.

[April 30.

GREEN *v.* CLARK.

Appropriation of payments—Evidence—Satisfaction of judgment.

G. and the firm of C. & P. were respectively judgment creditors of one J.; and G. accepted in satisfaction of his claim notes of J. indorsed by C. & P. for 60%, and J.'s unindorsed notes for 20% more, and G.'s judgment was assigned to C. & P. as security. C. & P. then undertook to supply J. with goods for which, as they claim, he was to pay cash. After a time C.& P. refused to give J. further goods, and recovered judgment against him on a demand note for a portion of their claim. Other judgment creditors of J. attempted to realize on his stock, and an interpleader order was issued in which C. & P. claimed to rank on the judgment of G. which had been assigned to them. The other creditors claimed that this judgment was satisfied, if not by the settlement with G. for 80', at all events by J.'s subsequent payments. C. & P., on the other hand, claimed that these payments were all on account of the new supplies of goods for which J. was to pay cash. In his evidence on the trial of the interpleader issue J. swore that the agreement to pay cash was only for one year and after that all payments were to be on the old account. The payments were sufficient, if so applied, to satisfy G.'s judgment.

Held, affirming the judgment of the court below, GWYNNE and PATTERSON, JJ., dissenting, that the evidence was not sufficient to rebut the presumption that the payments were on account of the earlier debt.

Appeal dismissed.

Lash, Q.C., for appellants.

G. Davis and *G. Mills* for respondents.

EXCHEQUER COURT OF CANADA.

THE QUEEN *v.* CHARLAND.

Award of arbitrators increased by the Exchequer Court—Hearing of additional witnesses—Appreciation of the evidence—Appeal to Supreme Court—Weight of evidence.

In a matter of expropriation of land for the Intercolonial Railway, the award of the arbitrators was increased by the judge of the Exchequer Court from $4,155 to $10,842.25, after additional witnesses had been examined by the judge. On an appeal to the Supreme Court it was

Held, affirming the judgment of the Exchequer Court, that as the judgment appealed from was supported by evidence and there was no matter of principle on which such judgment was fairly open to blame, nor any oversight of material consideration, the judgment should be affirmed. GWYNNE, J., dissenting.

Appeal dismissed with costs.

Hogg for appellant.

Belleau for respondent.

QUEEN *v.* VEZINA.

Expropriation of land—Damages—Injuriously affecting land taken—R.S.C., c. 39, sec. 3, subsec. E—Farm crossings—R.S.C., c. 38, s. 16.

A certain quantity of land belonging to V. was expropriated for the purposes of the Intercolonial Railway; $\frac{118}{100}$ arpents for the track, and $\frac{917}{1100}$ arpents for a borrowing pit whence gravel for ballast is taken. V. made a claim before the Exchequer Court for the land taken and for injury by the severance of his farm, and damages. The judge in the Exchequer allowed $100 per arpent for all the land taken.

On appeal to the Supreme Court,

Held, affirming the judgment of the Exchequer, that the land taken for the gravel, as ballast, there being no other market for the gravel, had been properly estimated at $100 per arpent as farm land.

In addition to the value of the land taken, the learned judge of the Exchequer Court allowed for depreciation of the remainder one-third of its value, excluding the damages resulting to a portion of the land from the operation of the railway. On appeal it was

Held, reversing the judgment of the Exchequer Court, GWYNNE, J., dissenting, (1) that the words "compensation to be paid for any damages sustained by reason of anything done under and by authority of R.S.C., c. 39, sec. 3, subsec. E., or any other Act respecting public works or government railways," include damages resulting to the land from the operation as well as from the building of the railway.

(2) That the right to have a farm crossing over government railways is not a statutory right, and that in awarding the damages the learned judge should have granted full compensation for the future as well as for the past for the want of a farm crossing. R.S.C., c. 38, sec. 16.

GWYNNE, JJ., dissenting.

Appeal allowed with costs.

Belleau for appellant.

Angers for respondent.

[April 30.

KEARNEY *v.* THE QUEEN.

Expropriation of land—Severance—Damages.

On the hearing of a claim referred to the Exchequer Court by the Minister of Railways, for compensation to the claimant for land taken by the Crown for railway purposes, the learned judge awarded a certain sum for the value of the land so taken, and a further amount as damages for the severance from land not taken in lieu of a crossing. There was evidence that the claimant made money by selling ballast and seaweed for manure and collecting driftwood for fuel on the remaining land.

Held, GWYNNE, J., dissenting, that as the sum allowed for the severance did not include future damage, and the evidence showed that the consequences of the severance would remain even if a crossing was made, the amount of compensation should be increased

Appeal allowed.

J. T. Wallace for appellant.

W. D. Hogg for the respondent.

GUAY *v.* THE QUEEN.

Appeal from the Exchequer Court—Expropriation for government railway purposes—Severance of land—Farm crossings—Compensation.

Where the land expropriated for Government railway purposes, severs a farm, although the owner is not entitled to a farm crossing apart from contract, he is entitled to full compensation covering the future as well as the past for the depreciation of his land by the want of such a crossing; and as it does not appear by the judgment appealed from that full compensation has been awarded, the damages assessed by the judge of the Exchequer Court should be increased by $100.

GWYNNE, J., dissenting.

Appeal allowed with costs.

Belleau for appellant.

Angers for respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[June 29.

WEAVER *v.* SAWYER & CO.

Appeal—County Court—Action tried with jury—R.S.O., c. 47, secs. 41, 42.

When a case in the County Court has been tried by a jury, the only appeal given by R.S.O., c. 47, s. 41, direct to the Court of Appeal from

the judgment at the trial, is when such judgment is directed to be entered upon special findings of the jury, and it is complained of as being wrong in law upon such findings. Any other appeal raising an objection to the conduct of the proceedings at the trial as to a motion for a non-suit, or the reception or rejection of evidence, or the charge to the jury, must be brought from the decision of the judge upon a subsequent motion for a new trial.

The general language of sec. 42 does not apply when the case is one coming within sec. 41.

Aylesworth for the appellants.

C. J. Holman for the respondent.

[June 29.

BOND *v.* CONMEE.

Malicious arrest—Justices of the Peace—Conviction for having liquors for sale near public works—Destruction of liquors—Necessity for quashing conviction before bringing action—Unsealed conviction returned on certiorari—Power to put in sealed conviction after such return—Notice of action—Statement of cause of action—Service of notice—Necessity for order for destruction of liquors—Necessity for quashing such order before bringing action—Venue—R.S.O. (1877), c. 32, secs. 2, 6, and 7, (R.S.O., 1887, c. 35, secs. 2, 6, and 7—R.S.O. (1877), c. 73. (R.S.O., 1888, c. 73).

The defendant C. and others were contractors employed in constructing a portion of the line of the Canadian Pacific Railway on the north shore of Lake Superior, 50 miles north of the mouth of the Michipicoten River, where there is a post of the Hudson Bay Company and a small collection of houses and stores known by the name of the Village of Michipicoten River. At this place the defendant C. and his co-contractors had their head quarters, and had constructed a supply road to the line of the railway where their operations were being carried on. The plaintiff brought to this village in a small sailing vessel a quantity of intoxicating liquors, intending to sell them at this place. The defendant C. and his co-defendant B., who were Justices of the Peace having jurisdiction in the District of Algoma, caused the liquors to be seized and destroyed, and the plaintiff to be arrested, fined, and imprisoned.

Held, that this was a village with n the meaning of R.S.O., c. 35, s. 1, and therefore that the prohibition contained in the Act did not apply, and that the Justices had no jurisdiction.

The plaintiff, after remaining in gaol for some six weeks, was discharged upon a writ of *habeas corpus*, the conviction having been brought up on certiorari, and one signed by the Justices, but not sealed, having been returned by them. The conviction was not quashed.

Held, that after the return to the writ of certiorari a new conviction could not be prepared, and that as the conviction as returned was not sealed it was a nullity, and that it was not necessary to quash it before bringing an action.

The notice of action stated that one month after the service of the notice an action would be brought for malicious arrest, etc., and for the malicious, etc., destruction of goods, and for damages for loss of time and injury to business, and for the recovery of costs and expenses, etc., "same having been committed by you against me in the month of May last at said Village of Michipicoten River, and at the Town of Port Arthur."

The notice was served on the defendant B. personally, and was served on the agent of the defendant C. at the head office of the defendant C. at Michipicoten River, and a copy was also left for the defendant C. at his place of residence at Port Arthur, and another copy was served on his solicitors. The defendant C. admitted that he had seen a copy of the notice, but it was not shown at what time or place he had seen it.

Held, that the notice and service were sufficient.

The venue in the action was laid at the City of Toronto, and subsequently by consent an order was made striking out the jury notice and directing the trial to take place at Port Arthur.

Held, that in view of this order the objection that the venue was improperly laid could not be sustained.

The order for the destruction of the liquors was not produced, but the person who destroyed the liquors stated, without objection, that he had received a written order to destroy the liquors signed by both Justices, and that he had returned the order to them. This order had not been quashed.

Held, that the defendants were entitled to say that the existence of the order was proved, but that the order for the destruction and the adjudication of destruction were two different things, and that in order to obtain protection the formal adjudication of destruction should have been proved, and that it was not necessary to quash a mere order for destruction.

The order spoken of in R.S.O. (1877), c. 73, s. 4, is an order in the nature of an original adjudication by the magistrate upon some matter brought before him by charge, complaint, conviction or otherwise, and not an order for the purpose of carrying out or enforcing such adjudication.

Judgment of the Common Pleas Division (reported 16 O.R., 716) affirmed.

Osler, Q.C., and *A. W. Aytoun-Finlay* for the appellants.

G. T. Blackstock for the respondent.

[June 29.

BETTS *v.* SMITH *et al.*

Contract—Tender—Incorporation of previous advertisement—Evidence.

This was an appeal by the plaintiff from the judgment of the Common Pleas Division, reported 15 O.R., 413, and came on to be heard before this court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 20th of May, 1889.

The court allowed the appeal with costs, holding that the advertisements and requirements formed part of the contract, and that the plaintiff was not limited to his rights under the tender and acceptance, and a new trial was ordered.

Lount, Q.C., and *F. R. Powell* for the appellant.

Bigelow and *S. G. McGill* for the respondents.

[June 29.

THE LONDON MUTUAL FIRE INSURANCE CO. *v.* JACOB AND GORDON.

Solicitors—Lien—Funds recovered in action.

Actions were brought by one G. against two insurance companies to recover losses occasioned by a fire. The actions were tried together, but one was dismissed with costs, and in the other the plaintiff recovered judgment. The defendants acted as G.'s solicitors in each action.

Held, reversing the judgment of ARMOUR, C.J., that the solicitors had no lien for the costs of unsuccessful action upon the fund recovered in the other, that fund not having been recovered or preserved by means of the costs incurred in the action which was lost, and the two actions not being so intimately connected as to be regarded one.

Macmillan for the appellants.

Jacob, one of the respondents, in person.

[June 29.

MOORE *v.* JACKSON.

Contract—Married Woman—R.S.O., c. 132.

To entitle a plaintiff to recover judgment on a contract entered into by a married woman, it is necessary for him to show that at the time the contract was entered into by her she owned separate estate, in respect of which she is enabled by statute to contract.

The defendant, a married woman, endorsed certain notes held by the plaintiff, and wrote him the following letter:

"I hold 400 acres of land near W., which is worth $33,000, and is all in my own name and right. By your renewing the note for $1,500 and the one for $600 I pledge myself solemnly to do nothing to affect my interest in the said lands either by deed or mortgage, unless said notes are paid to you in full."

The notes and the letter were proved at the trial and the examination of the defendant before the trial, in which she stated that at the time she signed the notes she owned property on her own account was also put in. There was no evidence as to the date of the marriage of the defendant or as to the mode in which the property was held by her.

Held, reversing the decision of BOYD, C., that there was not sufficient evidence to entitle the plaintiff to recover.

E. D. Armour for the appellant.

Moss, Q.C., and *J. R. Roaf* for the respondent.

[June 29.

HUTCHINSON *v.* CANADIAN PACIFIC R'Y. CO.

Railways—Negligence—Passenger.

This was an appeal by the plaintiff from the judgment of the Chancery Division, reported ante p. 93, and came on to be heard before this court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.), on the 22nd and 23rd of May, 1889.

The plaintiff was travelling in charge of cattle, and while the train was being made up got into a caboose which was standing on the track, thinking, as the fact was, that this caboose was to be attached to the train. While standing in this caboose, washing his hands, the train backed down upon it, and he was thrown down and injured. It was not shown that any of the railway employees knew that he was in the caboose, or that the coupling had been effected with more violence than usually occurs in the coupling of freight cars. The jury disagreed, and subsequently on motion judgment was given for the defendants.

The court dismissed the appeal with costs, holding that the plaintiff had not put himself in the position of a passenger in charge of the defendants, and in the absence of proof of any specific neglect of duty could not recover.

Osler, Q.C., *M. Walsh*, and *A. W. Aytoun-Finlay* for the appellant.

Aylesworth, and *A. MacMurchy* for the respondents.

CARROL *v.* PENBERTHY INJECTOR COMPANY.

Corporations — Libel — Publication — Admission of Manager — Liability of Corporation for libel published by manager.

The plaintiff was the patentee and manufacturer of an automatic steam injector, and the defendants were a company manufacturing automatic steam injectors, one J. being their manager. A printed circular signed "Penberthy Injector Company," contained certain statements as to the mode in which the plaintiff had obtained his patent, and this action was brought by him on the ground that these statements were libellous. At the trial it was proved that the circular had been found in various places, but the only proof of publication was an admission by J., made in conversation with the plaintiff, that the circular had been issued by the Penberthy Injector Company in reference to a circular issued by the plaintiff.

Held, that no authority can be inferred in a general manager or other officer of a bank or trading corporation of any kind to subject the corporation to actions for libel by his admissions to any person that he had published a libel on another person by their authority, and that there was, therefore no proof of publication.

If J. had been called as a witness and had proved that he had been so authorized, and that it formed part of his duty to do the act complained of, then the libel would be the act of the corporation.

Tench v. *Great Western Railway Co.*, 33 U.C.R., 8, distinguished.

Decision of the Queen's Bench Division reversed.

George Lynch-Staunton and *James Chisholm* for the appellants.

Moss, Q.C., and *Carscallen* for the respondent.

[June 29.

Re GODSON AND THE CORPORATION OF THE CITY OF TORONTO.

Municipal corporations — Investigation by County Judge — Prohibition — R.S.O., c. 184, s. 477.

Where the County Court Judge is making an investigation pursuant to the resolution of a Council under R.S.O., c. 184, s. 477, he is acting as *persona designata* and not in a judicial capacity, and is not subject to control by a writ of prohibition.

That writ is not to be applied to any proceedings of any person or body of persons whether they be popularly called a court or by any other name, on whom the law confers no power of pronouncing any judgment or order, imposing any legal duty or obligation on any individual.

Re Squier, 46 U.C.R., 474, considered.

The decision of ROBERTSON, J. (reported 16 O.R., 275), reversed.

Aylesworth and *Fullerton* for the County Court Judge.

C. R. W. Biggar for the City of Toronto.

Osler, Q.C., and *T. P. Galt* for the respondent Godson.

[June 29.

CRAWFORD *v.* UPPER.

Negligence — Injury caused by runaway horse — Liability of owner — Onus of proof.

The plaintiff while walking on the sidewalk was knocked down and injured by the runaway horse of the defendant. At the time of the accident the horse was harnessed to a sleigh, but no person or driver was in the sleigh, and all that was proved was that the horse was seen running away, that the sleigh upset, the occupants being thrown out, and that the horse then ran on the sidewalk and the accident occurred.

Held, that this was sufficient to make out a *prima facie* case of negligence, and that the onus of disproving that case and explaining the cause of the runaway lay upon the defendant.

Manzoni v. *Douglas*, 6, Q.B.D., 145, discussed.

Judgment of the Queen's Bench Division affirmed.

Whiting for the appellants.

Aylesworth for the respondent.

[June 29.

Re THE BOLT AND IRON COMPANY, LIVINGSTONE'S CASE.

Corporations—Managing director—Remuneration of officer of company—Breach of trust—Set off—Winding-up proceedings—Jurisdiction of Master—Assignment of claim after winding-up order—R.S.C., c. 129, s. 77, ss. 2, secs. 83, 86, 87, 93.

This was an appeal by Livingstone from the judgment of BOYD, C., reported 14 O.R., 211, and came on to be heard before this court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.), on the 16th of March, 1889.

The court dismissed the appeal with costs, unanimously agreeing with and fully adopting the judgment of the learned Chancellor.

Moss, Q.C., for the appellant.

Bain, Q.C., for the respondents.

[June 29.

CONNOR *v.* MIDDAGH.

HILL *v.* MIDDAGH AND THE CORPORATION OF STORMONT, DUNDAS AND GLENGARRY.

Municipal corporation—By-law to open road—Trespass—Necessity of quashing by-law before bringing action—R.S.O., c. 184, s. 338.

A municipal council passed a by-law to open a road in a certain defined course, and by a subsequent by-law appointed the defendant M. a commissioner to remove all obstructions from the highway so defined. M. cut down some trees of the plaintiffs and removed them and portions of fences. Actions of trespass were brought against M. and the council, but the by-laws had not been quashed.

Held, that the road defined in the by-law was the true road and could properly be opened as therein defined.

Held, also (BURTON, J. A., doubting, but not desiring to express a judicial opinion), that whether the road defined in the by-law was the true road or not, and whether, therefore, a trespass was committed or not, the by-laws, being under certain conditions and requirements within the general competence of the council, and not being quashed, afforded a complete defence to the actions.

Judgments of the Queen's Bench Division reversed.

Osler, Q.C., and *J. P. Whitney* for the appellants, the Corporation.

W. M. Douglas for the appellant Middagh.

Robinson, Q.C., and *Aylesworth* for the respondents, the plaintiff in each case.

HIGH COURT OF JUSTICE FOR ONTARIO.

Chancery Division.

BANK OF MONTREAL *v.* BOWER *et al.*

Will—Devise—"Wish and desire"—Precatory trust—Estate in fee.

A testator by his will made an absolute gift of all his property to his wife, subject to the payment of debts, legacies, funeral and testamentary expenses, and by a subsequent clause provided as follows: "and it is my wish and desire after my decease that my said wife shall make a will dividing the real and personal estate and effects hereby devised and bequeathed to her, among my said children in such manner as she shall deem just and equitable."

Held, that this did not create a precatory trust, and that the wife took the property absolutely.

In *re Adams* v. *The Kensington Vestry*, 27 Chy.D., 394, and In *re Diggles*, 39 Chy.D., at p. 257. referred to and followed.

McCarthy, Q.C., and *R. G. Code* for the plaintiffs.

Kidd for the defendants.

Practice.

ROSE, J.] [May 3.

FARQUHAR *v.* ROBERTSON.

Costs—Action of libel—Recommendation of jury as to costs—Affidavits of jurors—Depriving successful defendants of costs—"Good cause"—Costs of special jury.

When the special jury before which an action of libel was tried, returned to the court-room after considering their verdict, the foreman announced a verdict for the defendant. He then asked if the jury had anything to do with the question of costs. The trial Judge replied that he thought not, but if any recommendation was made it would be considered. The foreman then announced that in the opinion of the jury each party ought to pay his own costs.

Upon a motion by the plaintiff to the trial Judge for an order disposing of the costs in the way recommended by the jury,

Held, that the recommendation of the jury as to costs was not a part of their verdict, but was an announcement of a result at which they had no right in law to arrive; the verdict was complete before anything was said as to costs. If the verdict for the defendant would not have been given except with the recommendation as to costs, that would be matter for consideration upon a motion for a new trial, and not upon the present motion.

Upon the motion the plaintiffs filed affidavits of some of the jurors, stating that they would not have agreed in a verdict for the defendant if they had thought the result would be to throw upon the plaintiffs the whole costs of the action.

Held, that these affidavits were not receivable in evidence.

Regina v. *Feilowes*, 19 U.C.R. 48, followed. *Jamieson* v. *Harker*, 18 U.C.R. 590, distinguished.

It was also contended by the plaintiffs that the trial Judge should make an order depriving the successful defendant of costs upon the recommendation of the jury and the facts appearing in evidence.

Held, that the question of costs was within the power of the trial Judge, and he could only interfere with the event for "good cause" (Rule 1170). By acting on the recommendation of the jury he would in effect be abdicating his functions, and allowing the jury to determine what was "good cause."

"Good cause" means some misconduct leading to the litigation or in the course of the litigation which requires the court in justice to interfere; and there is a marked distinction between interfering with costs going to the plaintiff and costs going to the defendant; and upon the facts of this case there was no "good cause" for interfering. The trial Judge certified for the defendant's costs of a special jury summoned at his instance.

Robinson, Q.C., and *Lefroy* for plaintiffs.

S. H. Blake, Q.C., and *J. B. Clarke* for defendants.

Q.B. Div'l Ct.] [June 22.

NIAGARA GRAPE CO. *v.* NELLIS.

Consolidation of actions—Rule 652—Staying actions—Identity of issues.

The plaintiffs brought four actions each against a different person, alleging that the defendant in each case entered into a separate agreement with the plaintiffs to purchase and pay for certain grape vines, and to allow the plaintiffs certain future benefits to be derived from the possession and cultivation of the vines, and claiming payment, an account, and damages. The statements of defence were practically the same in all the actions, the defendants setting up among their defences that by the fraud of the plaintiffs certain promises and warranties on their part were omitted from the written agreement, and that the defendants were induced to enter into the agreement by fraud and misrepresentation on the part of the plaintiffs, and claiming rectification and damages. The sales to the several defendants were entirely separate and distinct transactions made at different times and under different circumstances, but the form of agreement made use of with each defendant was the same.

An order was made in Chambers under Rule 652 on the application of the defendants in all the actions staying proceedings in all but one, which was to be treated as a test action, the defendants agreeing to be bound by the result of it, but the plaintiffs being allowed to proceed to trial in the other actions after the trial of the test action, if they deemed proper.

Held, that actions will only be stayed where the questions in dispute are substantially the

same; and in this instance they were not the same, because the questions raised by the defendants upon their defences of fraud and misrepresentation would necessarily be different in each case, the negotiations for each agreement being distinct; and the order made in Chambers was set aside.

C. J. Holman for the plaintiffs.

W. M. Douglas for the defendants.

Q.B. Div'l C't.] [June 22.

IN *re* CITY OF TORONTO LEADER LANE ARBITRATION.

Abitration and award—Municipal by-law and appointment of arbitrators—R.S.O., c. 53, s. 13—Submission—Necessity for making rule of court—R.S.., c. 184, s. 404—Ex parte order—Rule 526—Disclosure of matters in dispute.

In the case of an arbitration under the Municipal Act, R.S.O., c. 184, a municipal by-law and appointments in writing by the parties of the arbitrators constitute such a submission to arbitration by consent as may be made a rule of court under s. 13.

R.S.O., c. 184, s. 404, provides that every award made thereunder shall be subject to the jurisdiction of the High Court as if made on a submission by a bond containing an agreement for making the submission a rule or order of such court.

Held, upon the language of this section, that the submission should be made a rule of court before the award is moved upon.

Held, also, that any party to the submission has *prima facie* a right to have it made a rule of court; and according to the practice existing when the consolidated rules came into force no person other than the applicant was entitled to be heard upon a motion for such an order; and therefore by rule 526 there is no necessity for serving notice of motion, and an order can be made *ex parte*.

Such an order is merely a necessary form in order to give the court jurisdiction over the award; it binds no one and concedes nothing; the granting of it is compulsory on the court upon the production of the proper affidavits; and the court can enquire into and adjudicate upon all matters ot substance when the award itself is sought to be attacked or enforced. Therefore, it was immaterial that upon an *ex parte* application for such an order it was not disclosed that there were certain matters in controversy between the parties as to enlargements of the time for making the award.

D. E. Thomson for city.

Bain, Q.C., for land-owners.

Q.B. Div'l C't.] [June 22.

BANK OF LONDON *v.* WALLACE.

Parties—Action to set aside fraudulent conveyance—Assignee for benefit of creditors—Adding a new plaintiff—Consent—Rule 324 (b.) —R.S.O., c. 124, s. 7, s.s. 2.

The action was brought to set aside a conveyance as fraudulent against creditors. The plaintiffs sued on behalf of themselves and all other creditors of the defendant R.W., and began this action in July, 1888. The statement of defence filed in December, 1888, alleged that in August, 1888, R.W. executed an assignment for the benefit of his creditors under 48 Vict., c. 26, whereby the exclusive right of action became vested in the assignee.

In February, 1889, the plaintiffs obtained an order under R.S.O., c. 124, s. 7, s.s. 2, giving them leave to take proceedings in the name of the assignee but for their own exclusive benefit to set aside the conveyance in question; and then applied for an order adding or substituting the assignee as plaintiff in this action. The consent of the assignee was not filed.

Held, that the assignee could not be added as a plaintiff without his consent in writing being filed, under Rule 324 (b.); but that the plaintiffs had the right to proceed under the order they had obtained by bringing a new action in the name of the assignee, to which his consent would not be necessary.

Aylesworth for plaintiffs.

C. J. Holman for defendants.

Q.B. Div'l C't.] [June 22.

IN *re* LEWIS *v.* OLD.

Prohibition — Division Court — Jury trial Judge withdrawing case from jury.

In a Division Court suit a jury was demanded and called, but the presiding judge withdrew from their consideration everything but the amount of damages to be awarded, saying that there were no facts in the case disputed, the plaintiff's evidence being uncontradicted. The

jury assessed the damages, and judgment was entered for the plaintiff.

Held, that where the plaintiff furnishes evidence which the judge thinks sufficient to support his case, the case cannot be withdrawn from the jury; the mere fact that the defendant does not call evidence to controvert the plaintiff's evidence by no means concludes the matter, for the jury might refuse to credit the plaintiff, and properly find a verdict for the defendant. The judge in this case exceeded his jurisdiction by assuming the functions of the jury; and the right to have the case submitted to the jury being an absolute statutory right, the violation of it was ground for prohibition.

Shepley for plaintiff.

Aylesworth for defendant.

Q.B. Div'l C't.] [June 22

IN *re* SOLICITORS.

Solicitor and client—Taxation of costs—Offer by solicitor.

The solicitors rendered to a client ten bills of costs, amounting in all to $428.83. The client obtained an order for taxation, reserving his right to dispute his liability to pay the bills, and reserving also the costs of the order and taxation. The bills were taxed at $329.76, more than one-sixth being taxed off; but the solicitors contended that they were not liable for the costs of the taxation under R.S.O., c. 147, s. 35 because of an offer made by them before the order but after service of the notice of motion therefor, to take $250 in full of all the bills, and a subsequent offer to take $200 in full of all but one. These were not offers to reduce the bills to the sums named, but were offers to take such sums if the bills were paid without dispute as to the client's liability upon them. The offers were rejected and the taxation proceeded with the above result. When the question of the liability upon the bills was still undetermined the client applied for costs of the order and taxation.

Held, that the solicitors when their offers were rejected remained in a position to claim the full amount at which their bills might be taxed, and therefore such offers could not avail them; and they must pay the costs of the order and taxation.

Re Allison, 12 P.R. 6, approved and followed.

Shepley for the solicitors.

W. H. Blake for the client.

Chy. Div'l C't.] [June 28.

MCKAY *v.* MAGEE.

Costs—Scale of—Action to set aside conveyance as fraudulent—Judgment under $200—Other claims against judgment debtor—Creditors' Relief Act.

The decision of BOYD, C., 13 P.R. 106; ante p. 284 was affirmed on appeal by a Divisional Court.

J. B. Clarke for appeal.

Middleton contra.

C.P. Div'l C't.] [June 29.

TROUTMAN *v.* FISKEN.

Judgment Debtor—Examination of—Judgment for costs only—Rules 926, 934.

A person against whom a judgment has been recovered for costs only cannot be examined as a judgment debtor.

Rules 926 and 934 considered.

Meyers v. *Kendrick*, 9 P.R. 363, has not been affected by the introduction of Rule 934, and is still the law.

J. F. Gregory for judgment creditor.

H. E. Irwin for judgment debtor.

FERGUSON, J.] [June 29.

BENNETT *v.* WHYTE.

Costs—Scale of—Jurisdiction of County Court—Counter claim—Set off.

The plaintiff in his statement of claim alleged certain transactions between him and the defendant, in the whole comprehending over $1,000, and claimed a balance of $169.72, and interest from the 1st January, 1888. The defendant by his statement of defence denied that he was indebted to the plaintiff in any sum, and alleged that the plaintiff was indebted to him for goods supplied and on certain promissory notes in the sum of $1,325.74, for which he counter claimed.

Held, that the matter of the counter claim was really a set-off, and even if it was not improper to call it a counter claim, having regard to Rule 373, this could not change its real character.

Cutler v. *Morse*, 12 P.R. 594, referred to.

The action was tried without a jury, and the plaintiff recovered $120.75, "together with his costs of action to be taxed according to the proper scale applicable."

Held, that a County Court has jurisdiction to entertain and investigate accounts and claims of suitors, however large, provided the amount sought to be recovered does not exceed the sum prescribed by the Act; and in this case a County Court would have had jurisdiction.

The case, not having been tried by a jury, did not fall under Rule 1172; and the determination of the scale of costs was a matter in the discretion of the court. In the exercise of such discretion the principles of Rule 1172 were applied to the case, and the plaintiff was allowed costs on the County Court scale, and the defendant the excess of his costs incurred in the High Court, as between solicitor and client, over the amount which he would have incurred in the County Court, to be set off.

Chapple for the plaintiff.

D. Armour for the defendant.

Law Students' Department.

The following papers were set at the Law Society Examination before Easter Term, 1889:

CALL.

REAL PROPERTY AND WILLS.

1. When a blank is left for the name of a legatee, what is the effect? Explain fully.

2. What is the effect of a bequest to a person for life with remainder to his executors and administrators? Explain fully.

3. From what time are annuities payable which are directed by will to be paid? At what periods are they payable when there is no express direction?

4. When a trespasser is in possession of lands can the plaintiff in ejectment, claiming under a paper title, call upon him under any circumstances to show title?

5. A. agrees to purchase land, and at the time of signing the agreement (which says nothing as to title) he is told by the vendor that the title is defective and cannot be made perfect. What are his rights and liabilities respecting title? Explain fully.

6. When the contract for the sale of land is signed by both vendor and vendee, what are the rights (if any) of the respective wives of vendor and vendee as to dower?

7. When an agreement for sale of land is made by an authorized agent, how should it be signed? Why?

8. What is the rule as to awarding damages in actions for specific performance of an agreement?

9. Where a mortgagor has died intestate since the *Devolution of Estates Act*, how can you enforce the mortgage if no letters of administration are granted? Draw a clause providing against difficulty (if any) in exercising the power of sale in such a case.

10. What is the effect of a conveyance from a man to his wife without the intervention of a third person?

HARRIS'S CRIMINAL LAW.
BROOM'S COMMON LAW, BOOKS 3 AND 4.
BLACKSTONE, VOL. I.

1. Give an example of *justifiable homicide*, and one of *excusable homicide*.

2. What is the *gist* of the crime of *conspiracy*? Answer in one word.

3. What verdicts are there, any one of which may be rendered on a trial for murder?

4. If a pickpocket should insert his hand in a person's empty pocket, with intent to steal the purse which he supposed to be in it, could he be convicted of any, and if so, of what crime? Reasons.

5. Distinguish *burglary* and *housebreaking*.

6. What difference is there between *larceny* and *robbery* in regard to the *removal* of the goods.

7. What is the main difference between the remedy available against a magistrate who acts without jurisdiction, and that available against a magistrate who acts erroneously within his jurisdiction?

8. Explain briefly the meaning of *damnum absque injuria*.

9. When may one person become liable for a tort committed by another on the ground of *ratification*?

10. What is the effect of a *saving clause* being totally *repugnant* to the body of the act in which it is contained?

CONTRACTS—EVIDENCE—STATUTES.

1. A., professing to have authority to do so, makes a lease of B.'s property to C. B. repudiates the transaction, stating that he never gave A. any such authority. What remedy has C.? Why?

2. How far will a condition be enforced which requires that parties before bringing an action shall first have the amount to be recovered ascertained by a third person?

3. What requisites are there for the admission in evidence of statements made by deceased persons in the usual course and routine of business?

4. A. and B. jointly make a promissory note to C. in 1880. In 1885, and again in 1887, A. pays interest on the note and dies, whereupon in 1888 C., relying on these receipts and interest, sues B., who sets up the Statute of Limitations. Who is right? Why?

5. A letter is written by A. to B. "without prejudice," containing an offer of settlement of matters in dispute. B. answers by letter accepting A.'s offer. Proceedings are taken notwithstanding this correspondence, and at the trial of the action A. contends his letter to B. cannot be read. How far is he right? Why?

6. What are the requisites for a promise which is to be the consideration for a reciprocal promise?

7. A. has a claim against B., which he assigns in writing to C. At the time of the assignment B. has as against A. a right to set-off an amount which would extinguish the debt. How far can he insist upon this set-off as against C.? Why?

8. What assignments for the benefit of creditors are protected in Ontario, and under what circumstances will a transfer of goods to a creditor be protected?

9. In what civil actions is corroborative evidence required?

10. What procedure can you adopt to prove an original registered instrument by a certified copy?

EQUITY.

1. A., a tenant of B.'s, agrees verbally with him for the purchase of the property he is tenant of. B. afterwards refuses to carry out the contract, setting up the Statute of Frauds. A. relies on his possession under the lease. Who will succeed? State the general law.

2. A., the executor of B., receives $1,000 on a supposed debt from C.; he distributes this money with other moneys of the testator to the creditors. C. subsequently discovers that he had previously paid the money to the testator, and brings an action against the executor to recover the same. State the rights of all parties. Give reasons.

3. A. B. and C. are co-sureties to D. for the sum of $5,000. Default is made under the bond. A. pays the whole amount. In the interval C. has become insolvent. What are A.'s rights as against B.? Reasons?

4. A., who has been an agent for the management of B.'s estate, is aware of the existence of a valuable marble quarry on one of the farms. He makes an offer for it at good agricultural value, which B. accepts. He, B., on learning of the quarry, seeks to have the sale set aside. Can he succeed?

5. What was the law as to the separate estate of married women being bound by their contracts? Has the same been in any way modified by Provincial legislation?

6. A testator gives his wife a power of appointment over a certain property. She makes the appointment by will in favor of one of the children of the marriage. The will has one witness. Will the execution be aided? Reasons for answer.

7. What, if any, distinction is observed by Courts of Equity in the way of construing executory trusts contained in marriage articles and wills respectively?

8. Into what investments are trustees permitted to place the funds of the estate? By what authority? A will directs the funds to be invested in first mortgages on real estate. Can the trustee invest in Canada Permanent stock?

9. Distinguish between the right to give evidence of a parol variation of written contract for the sale of lands in an action for specific performance

(1) Where plaintiff is "insisting" on performance with parol variation.

(2) Where defendant is "resisting" performance on ground of variation.

10. A., a chemist, has been in the habit of compounding a medicine in which there are certain secret ingredients, but not patented. He employs for this purpose a confidential clerk who, at the solicitation of B., imparts to him the secret. B. commences to manufacture and sell. Has A. any remedy? If so, what?

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ANTI-COMBINES ACT.

The judgment of the Court of Appeal in the great case of the *Mogul Steamship Co.* v. *M'Gregor, Gow & Co.* cannot but be regarded as the most important decision since that of *Vagliano* v. *Bank of England*, though, like that case, the matter is to be carried to the House of Lords. In the result, so far as the Court of Appeal was concerned, the judgment of Lord Coleridge, L.C.J., in favour of the defendants, has been upheld by Bowen and Fry, L.JJ., Lord Esher, M.R., dissenting. In his judgment the M.R. laid down amongst a series of propositions that an agreement among two or more traders who are not, and do not intend to be, partners, but where each is to carry on his trade according to his own will, except as regards the agreed act, that agreed act being one to be done for the purpose of interfering—*i.e.*, with intent to interfere with the trade of another—is a thing done not in the due course of trade, and is, therefore, an act wrongful against that other trader, and is also wrongful against the right of the public to have free competition among traders, and is, therefore, a wrongful act against such trader, and, if it is carried out and injury ensues, is actionable. On the other hand, Bowen, L.J., saying that it must be taken that the defendants had no personal ill-will to the plaintiffs, nor any desire to harm them, except such as was involved in the wish and intention to discourage, by the measures they took, the plaintiffs from sending rival vessels to certain Chinese ports, laid down that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as fraud, misrepresentation, or the intentional procurement, without just cause, of a violation of individual rights, contractual or otherwise, gives rise to no cause of action at common law; and the Lord Justice pointed out that in fact the combination of capital for purposes of trade and competition was a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy.

We insert the foregoing article from *Pump Court* of 24th July last, thinking it may tend to throw some light on Mr. Wallace's Anti-Combines Act, and the interpretation thereof, as to what acts are forbidden by and punishable under it, as being unlawfully done. From the judgment of the Court of Appeal, upholding that of Lord Coleridge, and Mr. Justice Bowen's reasons for so doing, which

seem to us reasonable and right, it would appear that a trust or combine within the limits mentioned in the said reasons, would not be unlawful by the law of England, nor would its object be held to be unduly effected. Lord Esher, however, thinks otherwise; and if the case is to be carried to the House of Lords we may say "*adhuc sub judice lis est.*" We believe there has been no Canadian judgment under this Act.

PARTIES TO ACTION TO ENFORCE MECHANICS' LIEN.

It will be seen from the note of the case of *Cole* v. *Hall*, *ante* p. 284, that the Court of Appeal has affirmed the decision of Ferguson, J., upon which we offered some remarks, *ante* Vol. 24. p. 481. The decision of the Court of Appeal proceeds on the ground taken by Ferguson, J., that according to the ordinary procedure of the Court to enforce liens, it is right and proper to make subsequent incumbrancers parties in the Master's office and not original parties to the writ. This, of course, apart from any question as to any Statute of Limitations, is a truism; but would this "ordinary procedure" enable a plaintiff to resist a defence of the Statute of Limitations if raised by a party added in the Master's office? For instance, assume a mortgagee brings an action for the foreclosure of the mortgaged premises, and a subsequent mortgagee in possession is not added in the Master's office until after the time limited by the statute for the plaintiff to bring action against him has expired. Would it be any answer to the defence of the Statute by the party added, that the action was commenced against the mortgagor in due time? The case has never actually arisen in any reported case that we have seen, but, on principle, we should say that it would be no answer. We observe that the Court of Appeal distinguishes *Cole* v. *Hall* from the *Bank of Montreal* v. *Haffner*, 10 App. R. 592, Cass. Dig. 289. In that case, the plaintiff, after bringing a suit against the "owner" to enforce his lien, in which the mortgagee was not made a party either by bill, or in the Master's office, subsequently brought a new suit against the mortgagee after the 90 days had expired, in order to recover the increased selling value caused by the plaintiff's improvements; but the action was held to be too late. If it was too late to bring a new action, would it not also have been too late to have added the mortgagee as a party in the Master's office, in the original action? because, according to the cases of *Juson* v. *Gardiner*, 11 Gr. 23, *Sterling* v. *Campbell*, 1 Chy.Ch. R. 147, a party added in the Master's office is not a party until the date of the notice, or Master's order, adding him, and therefore, if an attempt had been made to add the mortgagee as a party in the Master's office in the original suit after the 90 days had expired, would it not have also been held to be too late to do so? We are inclined to think it would, and that this is a proper deduction from the case of *Bank of Montreal* v. *Haffner*. Any distinction between the case of a prior mortgagee sought to be made a party to a lien action in respect of the plaintiff's right to the increased selling value, and a subsequent mortgagee, or execution creditor, on the ground, that the one is prior, and the other subsequent, to the

claim of the plaintiff, appears to us to be somewhat illusory. It is true the mortgage of the prior mortgagee is prior in point of time to the plaintiff's lien, but it is subsequent in point of interest to the extent by which the selling value of the mortgaged premises have been increased by the plaintiff's improvements, and to that extent, the prior mortgagee is by force of the Statute postponed to the plaintiff, and therefore as to him, becomes a subsequent incumbrancer, and it is in that character he is really made a party. The result of the two decisions of *Cole* v. *Hall*, and *Bank of Montreal* v. *Haffner* appears to lead to the conclusion, that although an independent action cannot be brought against a mortgagee in respect of the increased selling value after the lapse of the 90 days, yet he may in common with all subsequent incumbrancers be made a party in the Master's office to any action commenced within the 90 days against the owner, even though the 90 days may have expired before he is actually added as a defendant.

RAILWAY COMMISSIONS.

THE second annual report of the Interstate Commerce Commission in the United States has come to hand, and as it relates to matters connected with railroads, the governing principles of which are the same in Canada as in the States, we propose to give a short review of the results of this Commission.

All those who have followed with any interest the inception and subsequent stages of the proposals for an Interstate Railway Commission, until the present law came into force, appointing a Commission, will recollect the strenuous opposition given it by the railways and others. It was predicted that it would destroy the commerce of the country and ruin the railways. When the recommendation of the joint committee of the two Houses was presented, and the Act framed thereon was brought up for discussion, it was admitted that the Act contained a couple of material defects. As, however, the Act could not be amended without losing a session, many of those who were opposed to some of the provisions of the Act, but were in favour of the principle, voted for it and it became law. It was then predicted by some, most of them railway men, that it would be an entire failure, and for a time they laid themselves out to make it a failure by endeavouring to make as many difficulties as possible, and by giving no more assistance in carrying it out than they could help. This action, however, was not found to be a great success. The Commission was composed of first-class men who acted in all cases judiciously and fairly to all parties concerned, and the railways gradually found that instead of the Commission being a detriment to them it was really a help. It is true the Act prevented the many discriminations that had existed, and to some extent curtailed the powers of the railways to do as they pleased; but on the other hand it really helped the railways: (1) It prevented the cutting of rates at particular points to the detriment of others nearer the market; and (2) It gave the railways the right to refuse to give discriminations which they claimed were so often forced on them by customers against their will. One result amongst others was to make the freight

rates steadier and fairer than they were before, besides providing a tribunal of easy access which could inquire into and decide the question in dispute speedily and inexpensively, and in most cases in the locality where the cause of complaint arose. These in themselves were found to be of great benefit, particularly the being able to get a case heard and determined, no matter what the result might be, as there was a continual state of pent up irritation between the business public and the railways which never could get an outlet except by the expensive and tedious process of a law-suit, which for many reasons was hardly ever resorted to. Now, however, complainants come freely before the Commission, and from the large number of cases before them and the generally very satisfactory result of them, we think our neighbours have cause to congratulate themselves on having established such a useful tribunal. There is no doubt it is the only true way of settling such disputes. The experience gained by the Commissioners, whose whole time is given to this all-important subject, will undoubtedly be the best medium through which the legislature can be from time to time advised of the changes in the law required for the proper government of the railways.

Amongst other decisions of the Interstate Commerce Commission they lay down the principle, "That carriers in making rates cannot arrange them from an exclusive regard to their own interests, but that they must respect the interests of those who may have occasion to employ their services, and subordinate their own interests to the rules of relative equality and justice." These are good principles and such as we think have generally been forgotten by railways in dealing with the public, the railways maintaining that they have the same right of action in dealing with the public as one business man has in dealing with another, entirely forgetting that it is from the general public they get these privileges, and for that reason alone the public have a right to be dealt with without favouritism or discrimination.

In the United States the railway question is admitted to be the most important one in the country, not only from its size and ramifications, but from its intimate connection with the business of all classes of the community. Besides this, the ever varying phases of business continually provide a crop of new questions of a mercantile nature to be considered, adjusted, and determined on. This cannot be done in even a fairly proper way without the assistance of some body which, from a continual acquaintance with the subject, is able to give impartial decisions.

That which has proved beneficial in the United States would, we doubt not, prove beneficial in this country. The volume of railway business is of course vastly less here than across the border. But it is even now very large and is constantly increasing. The time must soon come when some similar commission will be constituted to do similar work in this country.

THE MEETING OF THE COUNTY JUDGES.

The County Court judges of Ontario have held their sixteenth annual meeting at Osgoode Hall, but no official report of the proceedings is published, and therefore the profession and public are not in possession of any information concerning the business transacted or the conclusions arrived at by the learned judges who assembled there for the interchange of opinions and the discussion of topics of interest to the judiciary and, we suppose, in most instances, to the public as well. There are obvious reasons why no official report of these proceedings is issued, yet we think that many of the topics discussed and conclusions reached are of so much professional interest that they should be published in outline at least, and we have been at some pains to ascertain such particulars as may usefully be laid before our readers.

It may readily be supposed that, as many of the county judges are revising officers, much attention was given to the Franchise Act. It seems to have been concluded that there is no necessity for taking the oath of office, except where appointments have been made since 1886. It was, in the opinion of the meeting, discretionary with the revising officer, where the voters exceed 300 in an existing polling sub-division, to sub-divide that polling division before the final revision of the list. But sub-division or re-arrangement is obligatory if there should prove to be more than 300 registered voters. The order making changes in the sub-division need not be posted elsewhere than in the divisions affected. The divisions may be numbered consecutively for the whole riding, or for each municipality, the former course being generally preferred, but there are obvious advantages in giving a local designation to each sub-division, and the practice is free from objection.

It was properly held that when declarations are made on information and belief, as they so often are, the nature of the information and the grounds of the belief should be set out with clearness and fulness, and that such declarations should be accepted only when this is done, and where the grounds on which the information and belief rest are, in the opinion of the revising officer, satisfactory. Some attention was also given to departures from the form of declaration prescribed by the Act Respecting Extra-Judicial Oaths, and it was considered that where the declaration does not state that it is made under that Act, it should be rejected as deficient.

It was urged that parties should not include in one declaration names from several divisions, so that all papers relating to each division could be kept separate.

By sec. 75 of the Assessment Act the clerk of each municipality is required to transmit to the county clerk a certified copy of the assessment roll of his municipality, as soon as it is finally revised and corrected. This furnishes the revising officer with a convenient means of access to the assessment rolls. Considerable diversity of opinion, we are informed, exists among the judges as to whether names already on the list for income should be allowed to remain or

should be put on the list for removal. It was pointed out on the one side that no information could be obtained as to income voters from the assessment rolls, and that these names were already on by judicial authority, and should not be removed unless cause were shown. On the other side it was contended that the only legal way for an income voter to be put on was by means of a declaration. Each view had numerous supporters. The question as to whether wage-earners whose names appear on the assessment rolls, should, or should not, be put on the first supplementary lists as income voters, was also left undetermined.

Various matters relating to the remuneration of the revising officers, and their re-imbursement for necessary expenditures were discussed and recommendations were made to the Government relating thereto. Great as is the expense involved in the working of the Dominion Franchise Act, the remuneration of the officers on whom the burden of the work falls is, in many instances, quite inadequate, and it seems unjust that they should have to pay out of their own pockets the expense of hiring court rooms for the final revision of the lists.

Some discussion took place as to the effect of the repeal of section 7 of the Act, thereby impliedly repealing the words "except as hereinafter provided" in sub-secs. 7 & 8 of sec. 3. Some doubt seems to exist as to whether it has not done away with the privilege of counting in the time of occasional and other absences as part of the time of residence of farmers' and owners' sons, as provided for in s.s. *a* & *b* of the repealed section. This seems to be the general impression.

Various points arising out of the criminal law were also discussed. The Dominion Act, 52 Vict., c. 44, s. 2, relating to the conditional release of first offenders in certain cases was considered, and the view that the words "punishable with not more than two years' imprisonment" were not to be restricted to cases in which the maximum penalty would be two years' imprisonment, but were to be taken as applying to any case in which the penalty may, in the judge's discretion, be not more than two years' imprisonment, was approved.

The Dominion Statute 52 Vict., c. 47, s. 4, speaks of the County Court Judge's Criminal Court of the County. Sec. 2 of chapter 49 of the Revised Statutes of Ontario calls the same tribunal the Judge's Criminal Court. Which is the proper name? The judges seem to be in favor of using the name fixed by the Dominion Statute. These courts have not power in Ontario to try perjury or forgery, though in Nova Scotia and Prince Edward Island they have. This seems anomalous.

Under the Dominion Act, 52 Vict., c. 47, s. 12, the County Attorney may, with the consent of the judge, prefer against the prisoner a charge or charges, for any offence or offences for which he may be tried under the provisions of this Act, other than the charge or charges for which he has to go to gaol for trial, although such charges are not mentioned in R.S.C., c. 174, s. 140. Suppose a prisoner tried and committed for robbery, and the County Attorney with the consent of the judge, prefers a new charge of indecent assault, the prisoner elects to be tried by a jury and is remanded. The question arises, whether the indictment must be preferred by the direction of the

Attorney-General, or whether the Grand Jury can present a bill of indictment unless the case comes under s.s. 2 of s. 140. The conclusion reached, so far as our information goes, appears to have been that the bill of indictment could be presented by the Grand Jury without the direction of the Attorney-General.

Such meetings as the one in question can not fail to be productive of much good. It is unfortunate that the work done by the judges in these gatherings in the interest of the public service, has to be done at the cost of the judges themselves. This ought not to be.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for July comprise 23 Q.B.D., pp. 1-135; 14 P.D., pp. 73-85; and 41 Chy.D., pp. 213-438.

ARBITRATION—APPLICATION FOR LEAVE TO REVOKE SUBMISSION—ARBITRATOR MAKING MISTAKE IN LAW AS TO MATTER WITHIN HIS JURISDICTION—3 & 4, W. 4, C. 42, S. 39—(R.S.O., C. 53, S. 38).

In *James* v. *James*, 23 Q.B.D. 12, the Court of Appeal affirmed the decision of a Divisional Court (22 Q.B.D. 669). An application was made in the Court below for leave to make a submission to arbitration under the provisions of 3 & 4, W. 4, c. 42, s. 39, (R.S.O., c. 53, s. 38), on the ground that the arbitrator in the course of the proceedings was making a mistake of law in a matter within his jurisdiction. The Divisional Court refused the motion, and the Court of Appeal (Lindley and Lopes, L.JJ.) affirmed the decision. The ground upon which the Court of Appeal proceeded may be gathered from the following passage from the judgment of Lindley, L.J.: "The parties agreed to refer all matters in difference to arbitration, and it was made a term of the submission that the arbitrator might decide the question of liability first. The parties came before the arbitrator and asked him to decide the question of liability first. He was not asked then to state a special case, but to decide the question of liability. He did decide it; and then the party against whom he decided comes and asks to be allowed to revoke the submission. The question is whether it is right that he should be allowed to take that course, after inducing the arbitrator to do what, in the ordinary course, he would not have done, viz.: to decide the case piecemeal. It seems to me that to take that course is really not quite consistent with good faith."

The decision of the House of Lords in *East and West India Dock Co.* v. *Kirk*, 12 App. Case, 738, was considered by their Lordships to lay down no general rule opposed to what had previously been the ordinary practice.

TRAMWAY COMPANY—STATUTORY POWERS—RUNNING POWERS OVER ANOTHER LINE—TRAMWAY IN A DEFECTIVE CONDITION—TRESPASS.

In *Sadler* v. *The South Staffordshire Tramways Co.*, 23 Q.B.D. 17, the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) affirmed a decision of Charles, J., at the trial of the action. The action was brought by the plain-

tiff to recover damages for injuries sustained by him by reason of a tram-car of the defendants' running off the line, owing to the defective condition of the tramway. The defendant Company was authorized by Act of Parliament to run tram-cars by steam, and had running powers over the line of another tramway company along a highway. By reason of certain points upon the latter line being defective, a tram-car of the defendants drawn by a steam engine went off the line and injured the plaintiff, who was on the highway. The defendants sought to escape liability on the ground that they were merely exercising their statutory powers in running over the line of the other Company and were not responsible for accidents resulting from defects in that line. But the Court of Appeal was unanimous in holding that the statutory powers of the defendants could not be taken to authorize them to run their tram-cars along a tramway in a defective condition; and that the tramway being defective, the defendants were guilty of an unlawful act in running their cars over it, and were therefore liable to the plaintiff.

STATUTE AUTHORIZING A PERSON TO BE HEARD BY HIMSELF—RIGHT TO APPEAR BY SOLICITOR.

The Queen v. *Jones*, 23 Q.B.D. 29, was an application for a mandamus to a commissioner assigned to try an election petition, to compel him to give audience to the solicitor for a person, not a party to the petition, who had been notified as having been guilty of corrupt practices. A statute provided that before any such person should be reported by the Election Court to have been guilty of corrupt practices, he must be notified, and in case he appears upon such notification, the Court shall give him an opportunity of being heard "by himself," and of calling evidence in his defence to show why he should not be reported. Lord Coleridge, C. J., and Pollock, B., and Hawkins, J., were unanimously of opinion that the words "by himself," precluded the right to be heard by counsel, or solicitor. The commissioner refused to hear the solicitor, because in his opinion, counsel alone could be heard. But, as we have seen, the Court refused the mandamus on the ground that neither counsel nor solicitor had any right to be heard.

LANDLORD AND TENANT—COVENANT RUNNING WITH THE LAND—LEASE OF PUBLIC HOUSE—COVENANT TO CONDUCT BUSINESS SO AS NOT TO FORFEIT LICENSE.

Fleetwood v. *Hull*, 23 Q.B.D. 35, was an action by the assignee of a reversion of a lease to enforce a right of re-entry for breach of covenant. By the covenant in question the tenant covenanted so to conduct business on the demised premises (which was a public house) as to afford no ground or pretext whatever, whereby the license might be suspended, discontinued, or forfeited or be in any danger of being suspended, discontinued, or forfeited. The lease contained a right of re-entry for breach of covenant. A person who occupied the premises by leave of the lessee was convicted of selling drink within prohibited hours. By a license Act, if three convictions for breach of the Act were indorsed on the license it would forfeit the license. The conviction in question had not been indorsed on

the license. On the two questions argued before Charles, J., he held that the covenant was one which ran with the land, and therefore the plaintiff, as assignee of the reversion, was entitled to sue for a breach; but the main question, whether there had been any breach of the covenant, he determined in favor of the defendant; as owing to the non-indorsement of the conviction on the license, the latter was not in any way endangered.

MALICIOUS PROSECUTION—ISSUE OF WARRANT—JUDICIAL ACT.

Lea v. *Charrington*, 23 Q.B.D. 45, was an action for malicious prosecution under the following circumstances. By an Act of Parliament on the information made before any Justice of the Peace, on oath, by any parent, relative, or guardian of any woman or girl, or any other person who, in the opinion of the justice, is *bona fide* acting in the interest of any woman or girl, that there is reasonable cause to suspect that such woman or girl is unlawfully detained for immoral purposes the justice was empowered to issue a warrant to search for such woman or girl, and also to arrest the person suspected of detaining her. The defendant, relying on a statement made to him by a third party, laid information against the plaintiff and procured a warrant for the plaintiff's arrest, which was the act complained of; but it was held by Pollock, B., and Manisty, J., that the issue of the warrant was a judicial act, and therefore an answer to the action. The case was held to be covered by the decision in *Hope* v. *Evered*, 17 Q.B.D. 338.

MUNICIPAL OFFICER—AGREEMENT BY MUNICIPALITY TO PAY ITS OFFICER FOR SUPERINTENDING A CONTRACT A COMMISSION ON AMOUNT OF CONTRACT IN ADDITION TO SALARY—INTEREST IN CONTRACT—CERTIORARI.

The Queen v. *The Mayor of Ramsgate*, 23 Q.B.D. 65, illustrates the extreme jealousy with which the Courts regard any attempts to evade the statutory provisions forbidding officers of municipal bodies from being in any way interested in contracts made with their employers. In this case the municipality empowered one of its officers, apart from his ordinary duties, to superintend the execution of certain works on their behalf, upon the terms that he should be paid by a commission on the contract price of such works. The officer duly superintended the works, and resolutions were passed by the municipality to pay him his stipulated commission. On a previous application the Court of Appeal had held that the effect of the bargain with the officer was to make him interested in the contract, and as such, liable to a penalty. The present application was to bring up the resolutions to quash them, and it was admitted by the defendants that the payment of the commission *qua* commission was invalid, but it was contended that a fixed sum equal to the amount of the commission might have lawfully been paid as an allowance, under an Act authorizing the municipality to pay to their employees "such reasonable salaries, wages, or allowances," as they might think proper, and that the validity of the payment was therefore a matter of form rather than of substance, and that therefore the Court should not interfere; but Field and Cave, JJ., were agreed that the payment was illegal and not warranted by the section authorizing "allowances," which term, in their judgment, did not include an allowance of money. The certiorari was therefore granted.

BANKRUPTCY—DEBT BARRED BY STATUTE OF LIMITATIONS—PART PAYMENT BY BANKRUPT FOR PURPOSE OF REVIVING DEBT.

In re Lane, 23 Q.B.D. 74, though a bankruptcy case, seems deserving of attention, as it deals with a point of law which does not appear to have been previously covered by authority. A debtor unable to pay his debts as they became due, within three months of his being adjudged a bankrupt, paid with his own money part of a debt barred by the Statute of Limitations, with the object of reviving the debt and enabling the creditor to prove in the bankruptcy for the balance. The debt up to the date of payment had always been treated by the debtor and creditor as a subsisting debt, and one which it was intended should be ultimately paid. The trustee in bankruptcy claimed that, notwithstanding the part payment, the debt in question was barred by the Statute of Limitations. But Field and Cave, JJ., were clearly of opinion that the debt had been validly revived by the part payment as against the trustee; and Field, J., was of opinion that even if the payment could have been recovered back as a fraudulent preference, that would not prevent the payment from having the effect of reviving the debt.

COUNTY COUNCIL—DISQUALIFICATION OF WOMEN AS CANDIDATES.

In *Hope* v. *Sandhurst*, 23 Q.B.D. 79, no less than eight judges were called upon to determine whether, under the English Local Government Act of 1888, women were eligible as candidates for election as members of the new County Councils established by that Act. First of all, Huddleston, B., and Stephen, J., decided they were not, and from their decision an appeal was had to an exceptionally strong Court of Appeal, consisting of Lord Coleridge, C.J., Lord Esher, M.R., and Cotton, Lindley, Fry, and Lopes, L.JJ., who all agreed in affirming the Court of first instance. The ground of the decision appears to be that the Act did not expressly render women eligible as candidates, and the Act could not be construed as impliedly qualifying them as candidates merely because it gave them a right to vote at the elections held thereunder.

GAME—POSSESSION OF FOREIGN GAME AFTER CLOSE OF SEASON.

Guyer v. *The Queen*, 23 Q.B.D. 100, seems to deserve a passing notice. By a somewhat curious coincidence it appeared that the appellant, Guyer, had been convicted by a Mr. Partridge, a magistrate, of having two partridges in his possession during the close season. Mr. Guyer thereupon applied to quash the conviction because the birds in question had not been killed in England, but were imported from Russia. Lord Coleridge, C.J., and Hawkins, J., agreed that the Act did not apply to birds killed abroad, and therefore quashed the conviction, but Manisty, J., dissented.

PRACTICE—ORDER FOR JUDGMENT IN DEFAULT OF DELIVERING ANSWERS TO INTERROGATORIES—SERVICE OF ORDER—SETTING ASIDE JUDGMENT—MERITS.

Farden v. *Ritcher*, 23 Q.B.D. 124, deals with a point of practice. An order had been made giving the plaintiff leave to sign judgment in default of the defendant delivering his answers to interrogatories within a limited time. De-

fault having been made, the plaintiff signed judgment under the order. Upon an application to set aside the judgment for irregularity, the defendant showed that on the day the judgment was signed a copy of the order had been left at his house, and that within three days thereafter (being, as he supposed, within the time limited by the order) he had delivered the answers to the interrogatories; there was no affidavit of merits. Huddleston, B., and Manisty, J., however, held, following a decision of Field, J., in *Hopton* v. *Robertson*, W. N. (1884), 77, that the order under which the judgment was signed did not require to be served at all, and that therefore the judgment was regular, and being regularly signed, it could not be set aside, except upon an affidavit of merits. The motion was therefore dismissed.

COLLISION—STERN LIGHT—CARRYING LIGHT CONTRARY TO REGULATIONS.

It may, perhaps, be of use to bestow a brief note on *The Imbro*, 14 P.D. 73, which was an admiralty action for collision. By "the regulations for preventing collisions at sea," Art. 2, "the lights mentioned in the following articles (which include Art. 11) shall be carried in all weathers, from sunset to sunrise": By Art. 11, "a ship which is being overtaken by another, shall shew from her stern to such last-mentioned ship a white light or flare-up light." It was held by Butt, J., that it is a breach of the above regulations for a vessel, when no other vessel overtaking it is in sight, to carry a white light permanently fixed upon its stern.

PROBATE—ADMINISTRATOR PENDENTE LITE—PAYMENT OF PREMIUM TO GUARANTEE SOCIETY OUT OF ESTATE.

In re Harver, 14 P.D. 81, was a probate action in which different wills of a deceased testator were propounded. An administrator *ad litem* had been appointed and required to give security to an amount over $50,000. One of the parties who had propounded a will, applied to the Court for authority to the administrator *pendente lite* to pay out of the estate £50 premium to a guarantee society who had become his security. The Court made the order on the applicant giving security to recoup the estate in the event of his failing to establish the will propounded by him, and being condemned to pay costs.

PROBATE—CODICIL TORN UP UNDER MISAPPREHENSION—PROVOCATION.

In re Thornton, 14 P.D. 82, a testatrix under the misapprehension that a codicil to her will was not properly executed, directed it to be torn in four pieces and enclosed to her solicitor, in order that he might prepare another copy for her to execute. This was done, but before another copy could be prepared the testatrix died. This was an application to admit the codicil to probate, which was granted.

COMPANY—WINDING UP—CLAIM FOR COSTS OF OBTAINING SPECIAL ACTS OF INCORPORATION.

In re Skegness and St. Leonard's Tramways Co., 41 Chy.D. 215, a contest arose as to the right of a parliamentary agent to proceed against a company ordered to be wound up, for his costs of obtaining two special acts of Parliament for the

benefit of the Company. The agent was employed by one Spark, who had taken an active part in the promotion of the Company, but who never became a member or shareholder of it. The first Act obtained was an Act of Incorporation, and provided that the costs of the company, of applying for, and obtaining, and passing the Act, should be paid by the Company. After this Act had been passed, the agent, either of his own accord, or upon the instructions of Spark, procured the second Act to be passed, authorizing the abandonment of part of the undertaking and extending the time for completion of the tramway, and which also contained a provision that the costs connected with it should be paid by the Company. The seal of the Company was affixed to the petition for this Act, but without authority; in fact the Company never had any board of directors or body of shareholders capable of entering into a binding contract, or of exercising any of the statutory powers, and it was ordered to be wound up shortly after its formation. Under these circumstances the Court of Appeal (Cotton, Lindley, and Bowen, L.JJ.) affirmed the decision of Chitty, J., that the Parliamentary agent was not entitled to prove against the Company for his costs, but must look to the person by whom he was actually employed.

ARBITRATION CLAUSE—MOTION TO STAY PROCEEDINGS—C. L. P. ACT, 1854 (17 AND 18 VICT., C. 125), S. 11 (R. S. O., C. 50, S. 38.)

In *Davis* v. *Starr*, 41 Chy.D. 242, the defendant agreed to employ the plaintiff as his agent for carrying on his business in a specified district for fifteen years; and the agreement contained a clause for referring to arbitration any disputes as to the construction of the agreement, or any payment, act, or thing relating to or arising out of the agreement. Before the time expired the defendant dismissed the plaintiff for alleged misconduct, and gave notice to refer the matters in dispute between them to arbitration, but among the matters in dispute he did not specify his dismissal of the plaintiff. Both parties appointed arbitrators, but before anything more was done the plaintiff brought the present action for wrongful dismissal; whereupon the defendant applied to stay the proceedings on the ground of the agreement to refer all matters to arbitration, but the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) agreed with Kekewich, J., in holding that as the defendant had taken upon himself to dismiss the plaintiff without awaiting the decision of the matters in difference by arbitration, the Court, in the exercise of its discretion, ought not to stay proceedings in the action, and that it was too late after the commencement of the action for the defendant to withdraw his dismissal.

BUILDING AGREEMENT—AGREEMENT FOR LEASE—EVIDENCE—APPROPRIATION OF PAYMENTS—ONUS—LEAVE TO AMEND.

Lowther v. *Heaver*, 41 Chy.D. 248, may be taken as an illustration of the equity maxim, "Equity looks upon that, as done, which ought to be done." One of the points determined in the case being shortly this, that where a building agreement is entered into, whereby it is agreed that upon the performance of

certain specified conditions, one party will make, and the other accept, a lease of the premises on certain terms also specified; then, upon the performance of the stipulated conditions, the rights of the parties are thenceforth governed by the terms of the lease, though it may not in fact have been executed. There was also another question of some interest, upon which the Court was also called upon to pronounce regarding a question of evidence. The action was brought to compel the execution of leases pursuant to a building agreement; the defendant resisted the action upon the ground that the rent was in arrear. In order to establish this defence, he produced an account against the original party to the agreement, and who was a builder, but who had since died, having assigned his interest to the plaintiff; and in this account he charged the builder with rent, and credited him with payments on account, leaving a balance due from him of £395; but he also produced another account, whereby it appeared he had made advances to the builder to the extent of £15,000, and had received payments which the defendant had applied on this indebtedness to the extent of £7,000. But the Court of Appeal held that before the defendant could make good his right to appropriate the payments as he had done, he must show that the builder had not himself made any appropriation; and in the absence of any evidence on this point, the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.) agreed with Kekewich, J., that as it was obviously for the interest of the builder to pay up the rent, as its non-payment involved a forfeiture of the property, that the presumption would be that he had so applied his payments, and therefore there was no evidence of rent being in arrear. This at first sight appears to be an exception to the ordinary rule which exempts a party from proving a negative, but inasmuch as the right of a payee to appropriate payments depends on the fact of the payer having made no appropriation, it really establishes that that fact, though a negative, is a necessary part of the case of a payee who claims the right to appropriate payments, because it is the basis on which alone his alleged right can rest. There is still one other point decided by this case to which we may refer, and that is one of practice. The leases in question were to be executed on the houses being "roofed in." The plaintiff in his statement of claim alleged that they were duly roofed in, and the defendant in his defence did not traverse this statement, which, under the English Rules, amounted to an admission of its truth; but by the evidence at the trial, it appeared that the roofing of some annexes had not been completely finished. The defendant then applied for leave to amend his defence by setting up that the houses were not roofed in, but Kekewich, J., refused leave to amend, and was sustained by the Court of Appeal.

THE MORALITY OF ADVOCACY.

The disregard of lawyers for truth and justice has been for many generations a standing topic for satire. The common view of the subject is expressed by Southey, with his usual neatness, in the address to Bishop Basil, which he puts into the mouth of the devil :—

> "The law thy calling ought to have been,
> With thy wit so ready and tongue so free,
> To prove by reason, in reason's despite,
> That right is wrong, and wrong is right,
> And white is black, and black is white,—
> What a loss I have had in thee!"

Dr. Arnold seems to have looked upon the profession of an advocate as of necessity immoral. In the "History of Rome" he speaks of "the study of law which is as wholesome to the human mind as the practice of it is often injurious." And in one of his published letters to Sir J. Coleridge, he speaks of his "abhorrence of the profession of advocacy," and asks whether there is no way by which a man can hope to reach the position of a judge without exposing himself to the injurious influences of the bar. It is, perhaps, however, amongst the lighter class of writers that lawyers of all sorts are most hardly dealt with. There is a piquancy in the contrast which is alleged to exist between the solemnity of the function which they claim to discharge—the administration of justice —and the disregard which their conduct is said to display for everything but the interest of their clients, which is irresistibly tempting to those who are bound to make a point of some sort or other, whatever may be the subject on which they write.

On the other hand, those who are guided in forming their opinions by their judgments rather than their sympathies will be slow to condemn any established and recognized profession as immoral; for they will feel that to do so is to condemn the general constitution of society, as it forms a connected whole, the different members of which are closely connected with one another. Advocacy has been a recognized profession in all societies, except the most barbarous and despotic, and it would be absurd to deny that it has rendered splendid services to every nation in which it has existed.

The leading principle by which the whole subject is governed is, that the profession of advocacy is an essential part of the general administration of the law. The principle itself is familiar, perhaps even trite, but its practical application is generally unperceived; for though both the words and the thoughts for which they stand are common-place enough, few persons set themselves seriously to consider what law is, and what is implied in its administration. A clear view on each of these points is, however, essential to any one who wishes to understand the moral questions connected with advocacy.

First, then, what is law? It is usually supposed that if a contrast can be drawn out between law and justice, the law is, as it were, refuted and exposed; but such contrasts may be true, and may yet prove little or nothing. Law is a

collection of rules, or, more properly, of commands, prescribing the application of certain principles to particular classes of circumstances, with inflexible rigidity and precision. Justice may be described, with some approach to correctness, as the sentiment on which law is founded, but, like the curve and the asymptote, they never coincide, however nearly they may approach. Probably no law was ever yet devised which entirely satisfied the sentiment of justice in every case to which it was applied. No laws are more general, and few appear more obvious, than those which punish crimes and enforce contracts. Yet definitions of contracts and of crimes are essential to such laws; and such is the infirmity both of human language and of human thought, that the best definitions ever constructed will always include many cases which never occurred to those who framed them, and which, if they could be settled on their own grounds and without establishing precedents, would unquestionably be determined in a manner totally different from that in which the law determines them; yet this does not condemn the law. Many actions involving the guilt of high treason are almost universally looked upon as virtuous, some even as heroic; yet no sane man would wish to see the law of treason relaxed.

It is, perhaps, not too much to say that there is a natural and inevitable opposition between a definition and the sentiment on which it rests. The sentiment which condemns dishonesty is as clear and strong as any sentiment can be. But how far is it satisfied by the definition of theft? The sentiment condemns the intention even more decisively than the act; but when a definition of theft is required, terms must be chosen which do not describe, and therefore leave unpunished, many acts which are morally indistinguishable from those which are punished. Laws must be general in their terms; and a certain harshness, sternness, and disregard of individual cases of hardship are inseparable from the very existence of law.

The first thing, therefore, to be borne in mind in examining the moral character of the profession of advocacy is that the advocate is administering law, and not attempting to satisfy the sentiment of justice, and is thus engaged in a task which is radically different from that which devolves upon persons placed in positions in private life apparently analogous to his own. The master of a house, in managing the affairs of his family; a person called in to advise upon the conduct which honour and conscience require under difficult circumstances; a man of business consulted as to the course which a tradesman in difficulties ought to pursue with regard to the interests of his creditors,—are all called upon in a sense to administer justice, but they are not called upon to administer law, for no one of them has to deal, as is the case with judges and advocates, with precise rules and inflexible definitions.

Such being the general nature of law, what is the character of its administration? It may probably be asserted with as much confidence as such broad propositions ever deserve, that the degree of liberty which a nation enjoys may be tested by the degree in which the task of setting the law in motion is left to private persons. In our own country this practice prevails, with few exceptions, in all cases civil and criminal. Judges and lawyers are inactive, unless they are

set in motion by private litigants who demand the application of the law to particular cases for the sake of obtaining some personal object. A man wishes to have the benefit of a contract, to receive compensation for a wrong, to get a criminal punished, and he applies to the judge appointed for that purpose to put the law in force. It is obviously necessary that the judge should hear what he has to say, and hence comes the necessity for professional advocates.

In considering the general character of the profession of an advocate, the first question which is suggested is whether the obligations which it imposes are, in their very nature, of such a character that a conscientious man ought to undertake them? Does the profession of an advocate place any one who acknowledges the obligation to be true and just in all his dealings in the same position in which the profession of a hangman would place a man who believed capital punishment to be sinful, or the military profession would place a Quaker? The common sense and common experience of mankind answer that it does not; but why not? Why is it not wrong and unjust for a man to hold himself in readiness to say what is to be said in favour of any one who wishes to put the law in force against his neighbour? That every one who does so habitually must frequently take part in shocking the sentiment of justice, and in inflicting hardships, often of the most grievous kind, on individuals, follows from the observation already made on the nature of the law. If a lawyer succeeds in his profession, there can be little doubt that he will, in the course of his career, brand honest men with infamy, deprive lawful proprietors of their possessions, and possibly deprive innocent men, not only of character and property, but of liberty and even of life! Why is it right to incur, without compulsion and of free choice, responsibilities (to call them by no heavier name) so tremendous?

To answer such questions by appealing to the common sense and common practice of the world is, for practical purposes, as wise as for other than practical purposes it is unsatisfactory. In order to give not merely a reason for disregarding such difficulties in practice, but an answer which removes them, it is necessary to go deep into the foundations of morality. The true answer is that for purposes of action, and especially for deciding on the morality of professions, we must assume that life is a good thing, or at least that, not being proved to be a bad thing, it is to be treated as good. From this it follows that all callings which are proved by satisfactory evidence to be essential to the transaction of the affairs of life must also be treated as good, and that such defects as are shown by experience to be inseparable from their working prove, not that they are bad, but that life itself is less beneficial than it would have been without them.

Thus the steps by which the profession of advocacy is justified are as follows: We must act on the principle that life is a good thing; therefore, that the administration of the law, which is essential to the transaction of the affairs of life, is good; therefore, that the advocacy which is essential to the administration of the law, is good; therefore, that the shocks given by the practice of advocacy to the sentiment of justice, and the hardships inflicted by it on individuals, which are inseparable from advocacy, are drawbacks from its advantages, and not objections to its existence.

If this general theory of the morality of advocacy is accepted, many of the common objections to it fall to the ground at once. It puts an end to all questions about pleading on the wrong side; for to the advocate whose duty it is to administer law, the wrong side means the illegal side; and which side is legally right is a question which can be decided only by a competent court; and the mode of arriving at a decision which courts of justice have deliberately adopted in this country is that of hearing all that can be said on both sides of the cases brought before them. No doubt it may be, and often is, morally wrong to exercise a legal right. It may be unmerciful, vindictive, grossly selfish, and abominably cruel to do so, but this is the concern of the litigant, not of the advocate. A legal right is a power put by society at large into the hands of a private person to be used at his discretion. The officers of the law, in their various degrees, enable him to use it; but there is no moral difference at all between the advocate who conducts to a successful termination a prosecution instituted from the vilest motives, and the judge who passes sentence on the verdict. No one blames the latter, nor ought any to blame the former.

Many persons would admit that this is, in theory, a sufficient justification of the profession of advocacy, but they would add: "Whatever may be the theory, the practice is, in point of fact, unjustifiable. Lawyers do not, as a rule, confine themselves to performing the duty which the law assigns them. They do twist evidence; they do, as far as they can, pervert and obscure the truth, and their standing and success in their profession is determined by the ability with which they contrive to do so."

This impression is as unjust as it is common. Its injustice is displayed most strikingly in the fact that it entirely overlooks the existence of a whole system of professional morality based upon the principles just stated, and rigidly enforced not only by the authority of the judges, but by both the good and bad qualities of the bar, by professional honour and *esprit de corps* on the one hand, and by personal rivalry and even jealousy on the other. It would be out of place here to enter upon a full description of this system, but it may be stated generally that its object is to maintain rigidly the representative character of the advocate. It forbids every expression and every form, either of statement or of interrogation, which would involve a surrender of that character and make the advocate a partisan, instead of a professional agent. To attack private character without explicit instructions that the imputations made are true; to misstate the effect of evidence; to put to a jury a false view of the law: to attempt to mislead the court by garbling or misquoting cases; to insult or attempt to confuse and bewilder a witness by a brutal manner or insolent questions,—are practices which are looked upon by the legal profession in the light in which tradesmen look upon sanding sugar and wetting tobacco; and they would, as a rule, be resorted to only by a low, disreputable class of lawyers. The general character of litigation is in itself a proof that it cannot be advantageously conducted by dishonest men. It is one of the foolish errors into which people are led by the wish to appear knowing, to assert that litigation is generally dishonest. In fact, it is an uncommon thing for people to go to law unless, whether right or wrong,

they have a substantial reason for doing so. Of the many foolish things that are said about the bar, few are more foolish than the common assertion that moral vices, such as impudence, coarseness, and lying, are useful to a lawyer. In fact, honesty is the best policy in that in precisely the same sense as in other professions. Each of the three vices named, is on the whole, injurious to a man's legal prospects. Impudence is often confounded with the possession of strong nerves,—the advantage of which no one disputes; but it is in reality quite a different thing. It is no more than insensibility to shame, arising from the absence of that internal warning which holds a man back from doing what is wrong, or makes him feel ashamed of himself if he does; but how is this an advantage to any one? It can only be one on the supposition that to do the shameful thing which modesty withholds a man from doing is an advantage. Impudence is very like imperfect bodily senses,—it consists not in an excess of courage, but in want of sensibility, and is a most serious defect both in speaking and in the examination of witnesses. It is impossible to do either of these things well unless the speaker can establish sympathy between himself and those whom he is addressing, and to do this considerable sensibility is indispensable. An impudent man does not feel whether the judge and jury are listening to him or not, nor has he any notion of the impression he is making. He cannot feel for the witness whom he examines, and therefore never examines him well, for he does not see how his questions affect him. The same may be said to a great extent of coarseness, which has moreover, the additional disadvantage of disgusting those who listen to it.

The notion that disregard for truth is an advantage to a lawyer is, of all the spiteful commonplaces which people take a foolish pleasure in repeating upon the subject, the most absurd. A man suspected of that vice is never trusted, either by the judges or by the bar; and no one who does not know by practical experience how much the despatch of business depends on the existence of such confidence can estimate the loss which the want of it inflicts. Suppose a judge detects a lawyer in misstating the effect of an affidavit, and on all subsequent occasions insists on reading his affidavits straight through,—is that likely to make him a pleasant person to deal with? Suppose that after giving a promise to the counsel on the other side to produce a particular witness, or to make a particular admission, he refuses to do so,—is he likely to be trusted with confidence in return?

The simple truth is that advocacy is neither more nor less moral than other professions. It is a practical expedient devised as the best mode of doing a very difficult thing, namely, administering the law. It shares with all other human pursuits the reproach of doing harm, though on the whole it does good. It possesses a high and strict standard of professional morality, which is, however, evaded by a noisy and conspicuous section of its members; and it gives its prizes to those who have the intellectual and physical strength to win them; but in attaining them the possession of the principal moral virtues are a considerable, though not an indispensable assistance.—*Cornhill Magazine*.

Reviews and Notices of Books.

Magistrates' Manual or Handy Book, Compiled from the Revised Criminal Law, Revised Statutes of Canada, and Revised Statutes of Ontario, 1887, with the several Amendments made thereto. By T. JONES, Deputy Clerk of the Peace, County of York. Toronto: Carswell & Co., 1889.

This book arranges the criminal statutes under heads in alphabetical order, and also refers to the proper sections of the statutes so that each enactment may be found in its proper connection.

The Law of Damages, a Treatise on the Reparation of Injuries, as administered in Scotland. By John Guthrie Smith, Sheriff of Aberdeen, Kincardine, and Banff. Second edition. Edinburgh: T. & T. Clark, Law Publishers, 1889.

A superficial glance at a work such as this is sufficient to forcibly remind the reader how distinct the jurisprudence of Scotland is from that of England. Plaintiffs and defendants are replaced by pursuers and defenders, and the legal phraseology varies in the same degree throughout. The sheriff is a judicial as well as an executive officer, but his judicial functions are ordinarily left in the hands of the Procurator-fiscal. The sheriff, however, in delicate or important cases may cause the precognitions to be laid before himself.

The first edition of this work appeared twenty-five years ago, under the title of "The Law of Reparation." Since that time the subject, owing to a variety of causes, has grown greatly in importance. Of recent years injuries to persons and property have formed a large part of the business of the Supreme Court as well as of the Sheriff's Court, particularly the latter. Before the time of the present Lord President cases relating to damages were imperfectly reported, and the most rapid development of the principles of the law of damages in Scotland has been within the last quarter of a century. The second edition of the book under review is consequently in reality a new work. The scope of the subject is so great that it is difficult to treat it within moderate compass, but the author seems to have succeeded admirably in his attempt to do so.

Papers Read Before the Medico-Legal Society of New York, from its Organization. First series, third illustrated edition. New York: The Medico-Legal Journal Association.

The Medico-Legal Society of New York was first organized in 1867. Its aim is to advance medical jurisprudence. It is international in character, on its roll of active and corresponding members being representatives of medico-legal science from all countries, as well as prominent physicians and lawyers from every State in the Union. Its success has been due, in a considerable degree, to

the energy and attainments of the present President of the Society, Mr. Clark Bell, whose portrait appears as the frontispiece of this volume. The Society, shortly after its organization, began the collection of a library, comprising all the current literature in medical jurisprudence in the English, French, and German languages. All the papers read before the Society were published in the public press, and were also issued in more permanent form in bound volumes. In 1883 the Society founded the *Medico-Legal Journal* upon the recommendation of Mr. Bell, who took editorial charge thereof, and since that time all the important papers read before the Society have appeared in the columns of the *Journal.* The publication of important papers read before the founding of the *Medico-Legal Journal* was a necessity, and of these, three series have been issued, the fourth is about half completed, and it will be followed by a fifth one. The first of these series has been for some years out of print, but the demand for it was so great that a third edition is now issued. This edition is embellished with portraits and is made more entertaining by short sketches. The papers contained in this series deal chiefly with intemperance and insanity in relation to crime.

Maritime Court, Ontario. General Rules (1889) *and Statutes, with Forms, Tables of Fees, etc.* By Alfred Howell, Barrister-at-Law, and Alexander Downey, Official Reporter of the Maritime Court at Toronto. Toronto: Rowsell & Hutchison.

The new Rules, Forms, and Tariff of Fees for the Maritime Court came into operation on 1st May, 1889. The Rules, etc., formerly in force have been superseded by the new ones. Since the rules of 1878-9 were issued, the Judicature Act and the procedure based on it have almost revolutionized all proceedings in civil actions in the High Court and County Courts. But it was not until the new rules came into force in May last that proceedings in the Maritime Court were brought into harmony with the new order of things. The changes brought about in maritime litigation by the new rules have been most favourably received by the profession. These Rules, in addition to bringing the Maritime Court into line with the Supreme Court of Judicature for Ontario, as far as was practicable, also embody such new features as were suggested by the Vice-Admiralty Courts Rules, 1883, and by the experience of the learned judge of the Maritime Court, whose name is a sufficient guarantee for the care, skill, and learning shown in their preparation. The work before us contains the various Acts, Canadian and provincial, relating to the Maritime Court, and to seamen and navigation, the Rules and Forms. A number of additional forms compiled by the editors, the tariff of fees, and a list of all the officers of the Court are also given. A list of reported decisions under the Maritime Jurisdiction Act, and some cases decided by the Supreme Court of Canada upon questions of maritime law is a useful feature of the book; but the decided cases are yet few in number. A full index completes the useful little book.

Commentaries on American Law. By Jas. Kent. New edition, by Wm. M. Lacey of the Philadelphia Bar. Volume I. Philadelphia: The Blackstone Publishing Company.

The first volume of Kent's Commentaries on American Law is now issued as the thirty-second volume of the Blackstone Series, so well and favourably known to our readers. The author's aim was, as everybody knows, to instruct students in the fundamental principles of American jurisprudence, and his work has long held the distinction of being the best general treatise on its subject. Since the last edition issued under the author's supervision, important changes have been made, many of the questions discussed by him relating to international law have since been considered, and have received authoritative decision, while decisions relating to internal affairs have increased a thousandfold, and a great mass of legislation has also served to leave the original work far behind the time. Mr. Lacey seeks to bring the work down to the present. In no case has the original text been altered or any portion of it been omitted, but where it has been necessary to insert new matter to make the text more intelligible or accurate, that has been done within brackets. Throughout, notes of reference to recent decisions and critical and explanatory notes have been added wherever they were deemed needful. Numerous cross references have been supplied, historical notes and explanations have been inserted, and the annotator has furnished, sometimes in substance, sometimes in full Acts of Congress, now in force. The editor seems to have done his work well. The treatise is of especial value to legal practitioners and students in the United States, but it is, nevertheless, of considerable interest and value to Canadians as well.

Correspondence.

LANDLORD AND TENANT.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—A question has been raised under section 5 of Mr. O'Connor's Act, 50 Vict., Cap. 23 (Cap. 143, R.S.O., 1887, Section 31) as to whether a tenant is entitled to 15 days' notice before a landlord can distrain.

On the part of the landlord, it is contended that it does not apply to cases of distress at all, that it is a mere amendment of the previous Act, 49 Vict., Cap. 29, Sec. 1 (Cap. 143, R.S.O., 1887, Sec. 9), and that it was only intended to apply to cases of ejectment for non-payment of rent.

On the part of the tenant, it is asserted that Mr. O'Connor's Bill, on which the Act was founded, was introduced for the purpose of abolishing the law of distress altogether—that it was considered too revolutionary to abolish it at one fell swoop—that distress should only be abolished by degrees—that clause 5 of the first Act was a compromise, not to take away distress altogether, as Mr. O'Connor had originally proposed, but to delay it for a time; that is for 15 days, and so as to make it correspond with the antecedent Act, 49 Vict., above cited—that it was considered rather inconsistent that a landlord could not enter to eject

with the process of the court for 15 days under 49 Vict., and yet that a landlord could enter to distrain *without process*, at once—that the compromise, so to speak, was come to, for the double purpose of giving the tenant something, though not as much as Mr. O'Connor had originally intended, and at the same time of placing the rights to enter, to eject, and to distrain, as to time, on the same footing—that the two Acts had different objects, one to benefit the landlord, and the other, the more recent one, the tenant—that the language of the O'Connor Act is in keeping with the old Statute of Richard II., passed to compel peaceable and easy, instead of violent entries, which had previously disgraced landlords proceeding by distress (see 5th Ed. Addison on Torts, p. 350)—that the original objects of the two Ontario Acts have been preserved separate and distinct in the revision of the Statutes (R.S.O., pp. 1313-1322), and that there is not a word in either to shew that one was intended to amend the other.

What do you think of the point? In view of the fact that the O'Connor Bill was introduced to abolish distress for rent altogether, one might well believe that the object of the 5th section of the Act was to delay distress for 15 days after demand for rent. There would be just as much reason for this delay, as to delay a landlord 15 days before bringing ejectment; and it would be a very natural preliminary to the expected abolition of distress altogether.

Of course it might be said that it would have been easy enough to insert the words, "or distrain" after "enter," in section 5, if it had been the intention to delay the distress for 15 days after demand for rent.

On the other hand, the Statute of Richard II. does not use the word distrain, and yet "enter" in that Statute means distress, and compels landlords distraining to enter peacefully and easily.

Toronto, 6th August, 1889. A SUBSCRIBER.

PRIVATE DELIVERY OF LETTERS.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—Can the Postmaster-General prevent the delivery of letters for reward except through the Post Office?

The recent increase of the rate on city drop letters to two cents naturally induced private enterprise to undertake the delivery of such letters at the old rate of one cent each, and the Postmaster-General appears to have availed himself of the exclusive privileges conferred upon him by s. 34 of the Post Office Act, c. 35, R.S.C., by compelling the parties to desist from their undertaking.

The question arises, however, is that section of the Post Office Act not *ultra vires* of the Dominion Parliament? Such an enactment can be referred to no other head of jurisdiction under s. 91 of the B.N.A. Act, than s.-s. 5, "Postal Service." But surely the delivery of a letter, or parcel, or message, or anything else sent by one person to another by a private hand does not come under the head of "Postal Service," since the post office has nothing to do with it from beginning to end. The very definition of a "post letter" given in the Act itself shows what postal service means, for a "post letter" is defined to mean "any letter transmitted or deposited in any post office to be transmitted by the *post*

or delivered through the *post*, or deposited in any letter box put up anywhere under the authority of the Postmaster-General to be transmitted or delivered through the post." A letter does not become a *post* letter until such deposit or delivery in a post office, and can it be said that Parliament is legislating respecting the postal service when it attempts to prohibit citizens from carrying letters or other things for reward, entirely independently of the post or any of its officers? On the contrary, such prohibition is an interference with a civil right, and, as such, an encroachment upon the domain of local legislatures which are given exclusive jurisdiction over the subjects of "Property and civil rights in the Provinces." If Parliament can usurp the business of carrying letters and exclude private parties from carrying it on, under color of its power to legislate respecting the "postal service," it can also appropriate to the post office exclusively the business of carrying parcels, newspapers, periodicals, etc., and of conveying telegraph, telephone, or other messages for reward; but my contention is that no such power is conferred upon our Parliament by the B.N.A. Act. Mark: that Act does not confer jurisdiction, exclusive or otherwise, upon the Dominion Parliament to legislate upon the general subject of "the delivery and transmission of letters, circulars, newspapers, or other mailable matter." If it did, no question would arise, but it is only the "postal service" that is mentioned. Suppose the B.N.A. Act had mentioned "railways and railway traffic" as one of the subjects assigned exclusively to Parliament, would Parliament be empowered under that to usurp all traffic that could go by railway, and prevent one from carrying freight in wagons by the ordinary roads for hire, or conveying passengers by stage for reward? Surely not; and this seems to be a parallel case to that under discussion.

It must not be forgotten that the Dominion Parliament is not like the Imperial Parliament, whose jurisdiction is not limited by statute. To put the point differently: If the delivery of a letter from A. to B. by a private party for reward is a matter relating to civil rights in the Province, and has nothing to do with the "postal service," then it comes exclusively within the jurisdiction of the Local Legislatures, and they can incorporate companies to carry on such business in the Province under s.s. 11 of s. 92 of the B.N.A. Act, or pass laws to regulate or govern such traffic, or to raise a revenue by licensing it, under s.s. 9.

If such business does not come under the head of civil rights, then it might fairly be said to come under s.s. 16 as a matter of a merely local or private nature in the Province, and would be equally beyond the jurisdiction of the Dominion. It may be said that such usurpation is a necessary incident of the postal service in order that the postal revenue may be kept up; but the power of Parliament to raise a revenue is provided for elsewhere, viz., in s.s. 3, which reads as follows: "The raising of money by any mode or system of *taxation*." No one would say that to punish a person for carrying a letter is taxation, so that s.s. 3 gives no ground for the jurisdiction claimed. On the whole, then, I think it is pretty clear that the section of the Post Office Act in question is *ultra vires*, and that private individuals or companies are free to engage in the business referred to.

Yours truly,

Winnipeg, August 16, 1889. GEORGE PATTERSON.

DIARY FOR SEPTEMBER.

1. Sun.....*Eleventh Sunday after Trinity.*
2. Mon.....Long vacation ends. Trinity term commences.
3. Tues....Court of Appeal Sittings begin. Sir Edward Coke died, 1634, æt 82.
5. Thu.....Chancery Division High Court of Justice sits.
8. Sun.....*Twelfth Sunday after Trinity.*
9. Mon.....General Sessions and County Court Sittings for Trial in York.
12. Thu.....Frontenac, Governor of Canada, 1692.
13. Fri.....Quebec taken and death of Wolfe, 1759.
14. Sat.....Trinity term ends. Last day for call notices for Michaelmas Term. Sir J. S. Copley (Lord Lyndhurst), Master of the Rolls, 1826.
15. Sun.....*Thirteenth Sunday after Trinity.*
17. Tues....First Parliament of Upper Canada met at Niagara, 1792.
18. Wed....Quebec surrendered to the British, 1759.
22. Sun.....*Fourteenth Sunday after Trinity.*
28. Sat.....W. H. Blake, First Chan. U. C., 1849.
29. Sun.....*Fifteenth Sunday after Trinity.*

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Div'l Ct.] [June 22.

LUPTON *v.* RANKIN.

Way — Access to road — Rights of way over adjoining lots—Rights of mortgagees — Way of necessity — Extinguishment by unity of possession—Revival on termination of possession.

C. conveyed to R. fifty acres of land and also a strip twenty feet wide to the south of it to give access from the fifty acres to the town line. R. mortgaged to C. the fifty acres but not the twenty feet strip, and then conveyed the strip to N. Afterwards R. conveyed the fifty acres to his son subject to the mortgage to C., and on the same day gave him the occupation under an agreement for sale of the adjoining fifty acres to the west. The son mortgaged to the plaintiff the fifty acres conveyed to him. During the possession of R. and his son they got access from the east fifty acres to the side line through the west fifty acres. The agreement for sale of the west fifty acres to the son having been cancelled, and R. having refused to allow a tenant of his son of the east fifty acres access to the side line through the west fifty acres, the plaintiff brought this action against R., C., and N., for a declaration as to the existence of a right of way through the strip conveyed to N or of a way of necessity through the west fifty acres, and for other relief.

Held, that if a right of way did pass to C. under the mortgage to him, it was a right of way only to C., his heirs and assigns ; and the existence of a right in the plaintiff to redeem C. did not give her the rights of C. until after redemption.

Held, however, that the plaintiff was entitled to a declaration of the existence of a way of necessity through the west fifty acres, which was given by way of implied grant when R. conveyed to his son.

The exercise of the implied grant was suspended during the time that the son had possession of the west fifty acres, but upon the termination of that possession the implied grant and the right of way under it were revived.

Idington, Q.C., for the plaintiff.

Lash, Q.C., for the defendant Thomas Rankin.

Osler, Q.C., for the defendant Nafziger.

Full Court.] [June 22.

REGINA *v.* BARNETT.

Criminal law—Larceny Act, R.S.C., c. 164, s. 65 — Fraudulent conversion of negotiable securities by trustee—Letter showing trust—Identity of instruments produced with those mentioned in letter—Conversion of proceeds of securities—"Property," definition of—Sanction of Attorney-General—Proof of.

The defendant was indicted and convicted under the Larceny Act, R.S.C., c. 164, s. 65, for that he, being a trustee of two negotiable securities for the payment of $5,250 each, the property of the C. Bank, for the use and benefit of the C. Bank, unlawfully and with intent to defraud, did convert and appropriate the said two negotiable securities to the use and benefit of him, the defendant, etc.

At the trial the following letter, written and signed by the defendant, dated 6th November, 1885, was produced: "I have this day been entrusted by A. (the cashier of the C. Bank) with two notes of $5,250 each, for the specific purpose of paying two notes for $5,000 that are due in Montreal on 8th November, 1885, and my failing this shall consider myself committing criminal offence and amenable to the criminal law."

The securities produced at the trial as those converted by the defendant were two drafts, not promissory notes, for $5,250 each, dated 7th Nov., 1885; and two drafts for $5,000 each were also produced answering the description of the notes for that amount mentioned in the letter, except that they were not actually notes and were due at Toronto on the 9th Nov., instead of at Montreal on the 8th. It was shown, however, that they were held by a person in Montreal.

It also appeared in evidence that the defendant procured one B. to discount the two drafts for $5,250 each, B. retaining $1,000 for an old debt and paying part of the balance of the proceeds to the defendant in diamonds.

The defendant did not take up the two $5,000 drafts, and retained the proceeds of the two $5,250 drafts. The drafts were identified by witnesses as to dates, amounts, etc., and entries in the defendant's memorandum book, also produced, showed the nature of the transactions with the cashier and B.

The trial judge stated a case for the opinion of the court.

Held, upon the evidence that the drafts were the property of the bank and not of the cashier in his private capacity, and upon the law and evidence, that the defendant was a trustee of the documents within the meaning of the statute; and that notwithstanding the discrepancies as to the nature of the instruments, the due date, and place of payment, there was sufficient evidence to go to the jury of the identity of the drafts produced at the trial with the notes mentioned in the letter above set out.

It was contended that the defendant should have been indicted for converting the *proceeds* of the securities, inasmuch as it was in the contemplation of the cashier that the defendant should convert the securities themselves:

Held, that the nature of the transaction with B. showed an appropriation by the defendant of the securities themselves to his own use, and per FALCONBRIDGE, J., even if it had been otherwise, the definition of property in s.s. (*e*) of s. 2 of R.S.C., c. 164, showed the sufficiency of the indictment.

It was objected that no proof was given at the trial that the sanction of the Attorney-General, required by R.S.C., c. 164, s. 65, s.s. 2, had been given:

Held, that this objection was not open to the court upon a case reserved, not being a question that could arise at the trial.

Knowlden v. *The Queen*, 5 B. & S. 532, followed.

Irving, Q.C., and *Osler*, Q.C., for the Crown.

G. T. Blackstock and *J. J. Maclaren* for the defendant.

Div'l Ct.] [June 22.

REGINA *v.* COUNTY OF WELLINGTON.

Constitutional law — Insolvency legislation — Powers of Dominion Parliament—33 Vict., c. 40 (d) — Intra vires—B.N.A. Act, s. 91, ss. 21 — Assessment and taxes — Exemption from taxation—R.S.O., c. 193, s. 7, ss. 1.

Held, that the statute 33 Vict., c. 40, which recites the insolvency of the Bank of Upper Canada, vests the property of the insolvent estate in the Crown as trustee for the creditors, and provides for its realization in order that the debts may be paid, is within the powers of the Dominion Parliament, under ss. 21 of s. 91 of the B.N.A. Act; and that the interest of the Crown, acquired under such Act, as mortgagee of certain lands, could not be sold for arrears of taxes, being exempt from taxation under R.S.O., c. 193, s. 7, ss. 1.

Lash, Q.C., and *H. L. Dunn* for plaintiff.

Bain, Q.C., for certain defendants.

Div'l court.] [June 22.

SMITH *v.* JAMIESON.

Husband and wife—Breach of promise of marriage—Infancy of defendant—Ratification at majority—R.S.O., c. 123, s. 6—Evidence—Corroboration—R.S.O., c. 61, s. 6—Contract not to be performed within a year—Statute of frauds.

In an action for breach of promise of marriage the defendant admitted a promise, but said that he was an infant when he made it, and that there was no ratification in writing after majority, as required by R.S.O., c. 123, s. 6. The plaintiff insisted that there was no engagement between her and the defendant until he became of age on the 20th August, 1887. The jury found that the promise to marry was first made on that day, there being evidence to sustain that finding, and also evidence upon which the jury might have found a previous promise.

The court refused to interfere with the finding.

There was evidence to corroborate the statement of the plaintiff that an engagement to marry existed, such evidence being not incon-

sistent with the precise engagement sworn to by the plaintiff as having been entered into on the 20th August, 1887:

Held, that this evidence satisfied the requirements of R.S.O., c. 61, s. 6, and it was not necessary that it should go so far as to be inconsistent with the promise which the defendant admitted he made before majority.

The plaintiff swore that "it was to be a year's engagement, and we were to be married in the following August:"

Held, that this was not an agreement not to be performed within a year, and was therefore not void under the Statute of Frauds, although not in writing.

McVeity for plaintiff.

Shepley for defendant.

Chancery Division.

OSLER, J. A.] [July 9.

DARBY *v.* THE CORPORATION OF THE CITY OF TORONTO, *et al.*

Municipal corporation—Representation previous to submission of money by-law—Costs—52 Vict., c. 73, s. 14 (O).

A municipal corporation previous to the submission of a money by-law to the vote of the electors issued a pamphlet to them which contained under the heading "Some of the reasons why the buildings should be erected" this clause: "In order that the buildings may be erected in accordance with * * legislation has been obtained authorizing the appointment of three commissioners to whom will be entrusted the supervision of the work * *", and after the by-law was approved of and passed they decided not to appoint commissioners.

In an action by a ratepayer to enjoin the corporation from proceeding with the work, it was

Held, that that representation formed no part of the by-law and was not a representation of an existing fact but a mere statement of intention, and formed no part of the bargain in the sense of a binding bargain between the corporation and the ratepayers, and there was nothing to bind the corporation to adhere to it, and they were at liberty to revoke or disclaim that intention and take another course, and that the action should be dismissed; but as the conduct of the corporation was so discreditable their costs were refused.

Held, also, that there was no person or class of persons for whose benefit the power under 52 Vict., c. 73, s. 14 (O) was conferred, or upon whom a right was conferred to have the power exercised, and that such power was not obligatory but permissive only.

A by-law is not a contract between the ratepayers and the corporation.

Remarks upon the practice of taking a *plebiscite* upon a subject wholly within the discretion of a corporation.

W. M. Hall for the plaintiff.

C. R. W. Biggar for the defendants.

Practice.

Q. B. Div'l Ct.] [June 22.

In re MOORE *v.* WALLACE.

Prohibition—Division Court—Attachment of debts — R.S.O., c. 51, s. 189—Absconding debtor—R.S.O., c. 66, s. 16—Payment to sheriff of moneys attached—Payment to Division Court clerk.

Where money comes into the hands of a Division Court clerk under a garnishee summons, and he is made aware of a writ of attachment under the Absconding Debtors' Act, he must pay the money to the sheriff and not to the primary creditor, under the provisions of s. 16 of the Absconding Debtors' Act, R.S.O., c. 66.

And where after the service upon the garnishees of a Division Court garnishee summons, a County Court writ of attachment was placed in the hands of the sheriff, and the garnishees paid the amount owing by them to the primary debtor to the sheriff, but the judge in the Division Court ordered the sheriff to pay the money to the Division Court clerk, and the clerk to pay it out to the primary creditors in the Division Court:

Held, that the judge was right in ruling that the money should have been paid by the garnishees to the Division Court clerk under sec. 189 of the Division Courts Act, R.S.O., c. 51, and therefore his order upon the sheriff to pay it to the clerk could not be interfered with; but the order to pay out to the primary creditors was contrary to s. 16 of the Absconding Debtors' Act; and prohibition to restrain the clerk from so paying out the money was awarded.

Aylesworth for the sheriff and attaching creditors.

John Farley for the Division Court creditors.

Court of Appeal.] [June 29.

BERTRAM *v.* MASSEY MANUFACTURING CO.

Costs—Jury Trial—Findings in favor of both parties—Substantial recovery by plaintiff—Depriving defendants of costs of issue found in their favor—"Event"—"Good cause"—Orders of trial Judge and Divisional Court.

The plaintiffs claimed more than $13,000 upon a special contract for iron sold to the defendants and damages for refusal to accept a portion of the goods sold. The defendants denied their liability to pay for any part of the iron, setting up that it was not what they had contracted for, and counter-claimed for damages for breach of contract. The case was tried by a jury, who in answer to questions left to them found that the iron delivered was not up to contract, but that the defendants had accepted and used a portion of it, and judgment was entered for the plaintiffs by the trial judge for over $5,000 for the portion of the iron used by the defendants at the contract price, less 15 per cent. for inferiority, as found by the jury, and also for the defendants for $200 damages upon their counter-claim, as found by the jury. The trial judge gave the plaintiffs the costs of the action and the defendants the costs of the counter-claim, and the Divisional Court (15 O.R. 516) affirmed the judgment and this disposition of the costs.

The defendants appealed upon the question of costs only, contending that they had succeeded upon the issue as to the quality of the iron and were entitled to the costs of that issue.

The defendants had not asked at the trial to have judgment entered for them upon such issue, nor was it so entered.

Held, by the majority of the court, that there was upon the evidence good cause within the meaning of Rule 1170 for depriving the defendants of the costs of the issue found by the jury in their favor, and the order of the trial judge and the Divisional Court should not be interfered with.

Per HAGARTY, C.J.O.: If the trial judge did not intend by his order to deprive the defendants of such costs, then the costs were properly left to follow the event, which was in favor of the plaintiff to the extent of over $5,000.

Per BURTON, J.A.: The defendants not having applied for judgment thereon, were not entitled to costs of the issue found by the jury in their favor.

Per OSLER and MACLENNAN, JJ.A.: Although there was no formal order specifically depriving the defendants of costs, the trial judge and the court below intended to deprive them of costs, for good cause.

Huxley v. *West London Extension R. W. Co.*, 14 App. Cas. 26, specially referred to.

Osler, Q.C., and *Watson*, for the appellants.

Robinson, Q.C., and *Lash*, Q.C., for the respondents.

Law Students' Department.

The following papers were set at the Law Society Examination before Easter Term, 1889:

CALL.

REAL PROPERTY AND WILLS.

1. A. died before the law of primogeniture was repealed, leaving a son and two daughters, and leaving a will whereby he devised Blackacre "to my son." After the death the three children executed a deed, reciting an intention to partition their late father's estate, "devised and described to them," and they thereby partitioned and allotted [the lands] amongst them in the following portions, etc. Then followed a covenant by each with the others for themselves, their heirs, etc., for further assurance, according to the Short Forms Act. One of the daughters offers her share for sale. Can she make title? Why? How would you classify such a deed?

2. A. conveys to B. a piece of land upon the secret verbal agreement that B. is to pay all creditors of A. who apply to him for payment, but not to call for creditors or pay any who do not apply, and afterwards to re-convey to A. After payment of some creditors, A. demands a reconveyance, which B. refuses. Several years afterwards a creditor, whose debt accrued after the conveyance, brings an action to have his debt paid out of the land. Can he succeed? Why?

3. At an auction sale of land A. bids the highest price and the land is knocked down to him, and he signs an agreement to buy. The vendor immediately refuses to carry out the sale, alleging that he desires to withdraw the lands as the price bid was not high enough. What remedy, if any, has the purchaser? Explain fully.

4. A house is sold for the purpose of being removed and broken up for the material. No writing is signed, but one-tenth of the purchase money is paid. The vendor refuses to complete the bargain. Has the purchaser any, and what, relief? Explain fully.

5. An advertisement for sale by the court describes lands as having 110 feet frontage. It is so valued for the purpose of a reserved bid, and so treated by bidders. The purchaser at the sale signs a contract without reading it. During the investigation of title the purchaser discovers from the deed that there are only 100 feet. The vendor answers that ten feet additional are held under a possessory title. A surveyor on measurement reports that there are only 100 feet. On looking at the contract the vendor and purchaser both discover for the first time that the frontage is there stated to be 100 feet. Has the purchaser any, and what, remedy?

6. A wife, having a decree for alimony, took by conveyance from her husband a valuable piece of land in lieu of alimony in 1869. In 1876 the wife conveyed without her husband. The wife died in 1883, leaving children by the husband. Can the title be forced on a purchaser? Why?

7. A mortgagee offers the land for sale under the power in the mortgage, and the sale proves abortive. The mortgagee a week afterwards sells at an advance of $1,000 to a clerk of his solicitor, who a year afterwards sells at an advance of $1,500 to a bona fide purchaser for value without notice. The mortgagor receives from the mortgagee a small surplus, and then sues the mortgagee and the solicitor's clerk for damages. Can he recover? If so, what is the measure of damages? Explain fully.

8. Upon a sale under a statutory short form power of sale in a mortgage, can the purchaser demand any, and what proof of default? Explain fully.

9. A devise to trustees, the property devised to be subject to a power in A. B. to appoint it as he pleases, by will or deed. Can A. B. appoint to himself? If not, what interest has he got in it? Can he lawfully take consideration for appointing to a stranger? Explain fully.

10. Can a power of sale exist in the person owning the fee simple of land? Why?

HARRIS' CRIMINAL LAW.

BROOM'S COMMON LAW, BOOKS 3 AND 4.

BLACKSTONE, VOL. I.

1. What is the difference between an arrest by a *private person, on view*, and an arrest by a private person *on suspicion*, as regards the breaking open doors, and as regards the legal consequences of such person killing, or being killed, in making the arrest?

2. On a trial for obtaining goods by *false pretences*, is evidence admissible to prove that the prisoner has *previously*, and *subsequently*, to the transaction in question obtained other property from some other person by the same pretence? If so, for what purpose?

3. Give an example showing how a person may be guilty of *larceny*, although the goods were voluntarily delivered to him by the owner.

4. In what cases is the Court bound to grant a *reprieve* to a prisoner?

5. What is the general rule as to the competency of the *wife* of one of two prisoners *jointly indicted and tried*, as a witness for or against the other prisoner?

6. Explain the meaning of *constructive breaking* in burglary, and give an example.

7. Under what circumstances will a person be guilty of *larceny* of goods which he has *found*?

8. Explain the difference between actions of *slander* and *malicious prosecution*, in regard to the necessity for proof of *malice*.

9. Discuss briefly the question of the necessity for proof of *privity* in an action *ex delicto*.

10. In what different ways may a corporation aggregate be dissolved?

CONTRACTS—EVIDENCE—STATUTES.

1. In an action on an agreement at the trial the plaintiff's counsel proposes to prove by a witness that defendant's solicitor admitted in

conversation that there was a written agreement, defendant having denied that such was the fact. How far is the evidence admissible? Why?

2. In dealing with a lost document, as far as concerns its value and weight as evidence, distinguish the functions of the Judge from those of the Jury.

3. How far may apparent deficiencies in a document be supplied by oral evidence?

4. How far will a verdict against a testator or intestate bind his representatives?

5. In an action for goods sold and delivered, plaintiff proves delivery of the goods to and receipt by the defendant, defendant having been in the habit of selling goods on commission for the plaintiff. Defendant calls no evidence, but claims that the plaintiff should fail, not having proved an order. How far should he succeed? Why?

6. How may *Infancy* be proved?

7. What is the rule as to the apportionment of entire contracts? Illustrate by an example.

8. Explain the limitations which are required by Statute in the case of chattel mortgages to secure advances and to secure against endorsements respectively.

9. A. insures his life for the benefit of his wife and children. After paying premiums for ten years he wishes to surrender the policy and take its surrender value, but the company declines, on the ground that the policy is not his property, having been made out for the benefit of his wife and children. Is the company right? Why?

10. "An agreement may be void by its connection with an unlawful purpose, though subsequent to the execution of it." Discuss this statement.

EQUITY.

1. A., who is carrying on business for himself, procures B. to become surety for the honesty of his clerk C. After this he enters into partnership with D. C. subsequently embezzles some of the partnership moneys. Action is brought against the surety for indemnity; he disputes the liability. Who should succeed, and why?

2. What, if any, statutory provision is there affecting the rights of the mortgagee to distrain for arrears of interest?

3. A. leases a farm to B. for a term of five years. There is a proviso in the lease that B. shall have the privilege of purchasing on giving certain notice, and paying on a certain day. B. gives the required notice, but does not pay the money on the exact day named. He, however, tenders it the next day. A. declines to take the money or carry through the purchase on the ground of delay in payment. Can B. compel specific performance? Reasons.

4. A. owns farm Blackacre; he rents farm Whiteacre, which adjoins Blackacre, from B; he, without any intention of acting fraudulently, removes the boundary fence. When the lease expires it is impossible to find the original fence-line between the properties. Is there any remedy in equity? Explain fully.

5. State fully the necessary proceedings where you are applying for the sale of the land of infants.

6. A. enters into an agreement in writing for the sale of certain property from B., mentioned therein as follows: "A house and lot in the city of Hamilton, more particularly described in a mortgage to the Canada Permanent for $5,000." A., on B.'s refusal to carry out the contract, brings action for specific performance. B. sets up in defence the statute of frauds. Who should succeed? Explain.

7. State the law as to the right of a tenant to call upon his landlord to interplead when adverse claims are made against him for rent.

8. A., a trader in insolvent circumstances, goes to B., who is a creditor, and asks him for a loan of $1,000 to enable him to carry on his business. B. agrees to do so on being secured for that amount and his previous indebtedness. A. afterwards makes an assignment deed; the assignee endeavors to have the security set aside as a fraudulent preference. Can he succeed? Explain.

9. A. is a receiver in possession as such of certain real estate; B. considers himself entitled to it. In what way can B. test his claim?

10. Define the term subrogation, and exemplify.

Miscellaneous.

ERRATA.—Owing to the absence from Toronto of the writer of the article on "Maintenance," ante p. 385, we were unable to submit a

proof of it to him for revision before its publication, and unfortunately some few errata in the proof escaped correction, viz.: P. 386, 3rd line from the top, for "institute" read "constitute"; p. 386, 4th line from the top, for "amount" read "commencement"; p. 386, 24th line from the top, after "Edward I." insert "were"; p. 386, 11th line from bottom, for "settler" read "seller"; p. 388, 20th line from top, for "make a former will" read "revoke a former will"; p. 388, 23rd line from top, for "in champerty" read "for champerty"; p. 389, 7th line from bottom, for "*Edwards*" read "*Edmunds*"; p. 390, 7th line from top, for "any" read "are"; p. 390, 11th line from top, for "infringement" read "assignment"; p. 390, 13th line from the top, for "law of merchant" read "law merchant."

Law Society of Upper Canada.

CURRICULUM.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with clause four of this Curriculum, and presenting (in person) to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present (in person) a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or to be passed as an Articled Clerk (as the case may be), on conforming with clause four of this Curriculum, without any further examination by the Society.

3. Every other Candidate for admission to the Society as a Student-at-law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this Curriculum.

4. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, four weeks before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher and pay $1 fee: and on or before the first day of presentation or examination file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

5. The Law Society Terms are as follows:—

Hiliary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, second Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The Primary Examinations for Students-at-law and Articled Clerks will begin on the third Tuesday before Michaelmas Term.

7. Graduates and Matriculants of Universities will present their Diplomas and Certificates on the third Thursday before each Term at 11 a.m.

8. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday of June of the same year.

9. The First Intermediate Examination will begin on the second Tuesday before each Term, at 9 a.m. Oral on the Wednesday, at 2 p.m.

10. The second Intermediate Examination will begin on the second Thursday before each Term, at 9 a.m. Oral on the Friday, at 2 p.m.

11. The Solicitors' Examination will begin on the Tuesday next before each Term, at 9 a.m. Oral on the Thursday, at 2.30 p.m.

12. The Barristers' Examination will begin on the Wednesday next before each Term, at 9 a.m. Oral on the Thursday, at 2.30 p.m.

13. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

14. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

15. Service under Articles is effectual only after admission on the books of the Society as Student or Articled Clerk.

16. A Student-at-law is required to pass the First Intermediate Examination in his third year, and the Second Intermediate in his fourth year, unless a Graduate, in which case the First shall be in his second year, and his Second in the first seven months of his third year.

17. An Articled Clerk is required to pass his First Intermediate Examination in the year next but two before his Final Examination, and his Second Intermediate Examination in the year next but one before his Final Examination, unless he has already passed these examinations during his Clerkship as a Student-at-law. One year must elapse between the First and Second Intermediate Examination, and one year between the Second Intermediate and Final Examination, except under special circumstances, such as continued illness or failure to pass the Examinations, when application to Convocation may be made by petition. Fee with petition, $2.

18. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

19. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

20. Candidates for call to the Bar must give notice signed by a Bencher, during the preceding Term. Candidates for Certificates of Fitness are not required to give such notice.

21. Candidates for Call or Cert ficate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

22. No information can be given as to marks obtained at Examinations.

23. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

24. All notices may be extended once, if request is received prior to day of Examination.

25. Printed questions put to Candidates at previous Examinations are not issued.

FEES.

Notice Fee	$ 1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM for 1889.

Students-at-Law.

1889. Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.
Cicero, In Catilinam, I.
Virgil Æneid, B. IV.
Cæsar, B. G. b, I. (33.)

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a selected Poem:
1889—Scott, Lay of the Last Minstrel.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.
Translation from English into French Prose.
1889—Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the year 1889, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.
Euclid Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of clerkship mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors, in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 123 Revised Statutes of Ontario, 1887, and amending Acts.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act; R.S.O., 1887, cap. 44, the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110, 143.

Three Scholarships can be competed for in connection with this Intermediate by Candidates who obtain 75 per cent. of the maximum number of marks.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

Michaelmas Term, 1888.

The Canada Law Journal.

VOL. XXV. OCTOBER 1, 1889. No. 15

A SUBSCRIBER suggests an alteration in long vacation, by making it commence somewhat later on in the summer. There is much to be said in favor of his view. It is worthy of discussion, and doubtless the Judges would be glad to hear the view of the profession on the subject, that they might take such action as would be in their general interests.

AMERICAN BAR ASSOCIATION.

The American Bar Association held their annual meeting in Chicago in August. David Dudley Field presided, and his opening address is full of information and good things. Of the forty-two States and five Territories comprised in the Republic (he tells us), all but eight have now biennial instead of annual meetings of their Legislatures. During the year the local law makers enacted ten thousand laws, to which multitude the gentlemen of Congress added 517. Truly a goodly number; yet "it is worthy of remark that in all this multitude of enactments there are few, very few indeed, of general interest": much sack, little bread. Strange to say, Mr. Field does not think the change to biennial sessions a wise one; it is engendered by "a general disrespect for Legislatures." He does not agree with Dr. Sangrado, who says, "When the body is sick the blood is sick. Take from the patient half his sick blood, and he is but half as sick as he was." He does not consent to the argument that as the Legislatures do more harm than good when they meet, therefore, cut their years of meeting to one-half, and, presto! but half the mischief. He believes his countrymen can still elect honest representatives: "The upright citizens, they who desire honest government, are an immense majority of the American people; the politicians are a timorous set, who will cower and run the moment they hear the growl of the people."

His ideals of a true lawyer are high. "He is a minister of justice. Upon him and his brethren, more than upon any equal number of citizens, depends the good order of the State. . . . The lawyer is, and must always be, first in a free and peaceful nation. Of the twenty-two Presidents, eighteen have been lawyers; a majority of Senators have come from that profession," and the legal element

in the House of Representatives is strong. These things being so, Mr. Field rightly remarks (and his words apply with equal force to our own Dominion, where the lawyer is almost as prominent), the training and discipline of lawyers and their notions of duty and honour are matters of concern to the whole body politic. Whatever may tend to elevate them in their own just estimation, or in that of the public, and the better enable them to understand their true calling and prompt them to fulfil it, should be the study of their lives.

The duties of lawyers to their clients and the courts are given in the language of the Code of Civil Procedure for New York, and chiefly copied from the old Genevan oath. They are, "To support the Constitution and laws of the United States and of this State. To maintain the respect due to the courts of justice and judicial officers; to counsel and maintain such actions, proceedings, or defences only as appear to him legal and just, except the defence of a person charged with a public offence; to employ for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never seek to mislead the judges by any artifice or false statement of law or fact; to maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his clients; to abstain from all offensive personality, and to advance no fact prejudicial to the honour or reputation of a party or witness, unless required by the justice of the cause with which he is charged; not to encourage either the commencement or continuance of an action or proceeding from any motive of passion or interest, and never to reject for any consideration personal to himself the cause of the defenceless or the oppressed." These are, truly, apples of gold in pictures of silver, and worthy to be taught diligently to our students-at-law, to be talked of at all times, to be bound as a sign upon the hnad, to be written upon the posts of the house and on the gates of every practitioner.

Mr. Field thinks a lawyer is bound to deliver his opinion to every comer, with this qualification, however, that if he knows that his opinion will be abused for unlawful or unjust purposes, he should withhold it. He admits that his craft does not rigidly perform the duties due to the State. These are his words: "We (the Americans) are a boastful people; we make no end of saying what great things we have done and are doing,and yet behind these brilliant shows there stands a spectre of halting justice such as is to be seen in no other part of Christendom. So far as I am aware there is no other country calling itself civilized where it takes so long to punish a criminal and so many years to get a final decision between man and man. Truly may we say that justice passes through the land on leaden sandals." Yet for the sixty millions in the United States there are nearly seventy thousand lawyers, while France with her forty millions has but eight thousand four hundred, and Germany with forty-five millions has only seven thousand. "Is it any wonder that a cynic should say that we American lawyers talk more and speed less than any other equal number of men known to history." (On the other hand, the editor of the Albany *Law Journal* says: "There is no country in the world where there is less criminal violence and where human life is safer than in England, and the reason is the promptness, certainty, and severity of punishment.")

"The marvels of iteration and expansion, centuries old, musty and rusty," of legal documents are very objectionable to Mr. Field. Life is too short and patience too weak for "words, words, words." Cataracts of words are not pleasing to him. He insists that it is the duty of the lawyer to help remove patent defects in jurisprudence, from time to time to improve the law, and to help diffuse among the people a knowledge of all the law of the land. He does not adore the Common Law; thinks the laws at present are in a chaotic state, that they require and must have, sooner or later, applied to them a process of elimination, a process of condensation, and a process of classification. In fact he demands a code, that all the people of the land may know the law, and know it before they get into it. It seems strange after so much has been said in favour of codification, that out of the forty-two States of the Union there are but five—California, North and South Dakota, Georgia, and Louisiana — which have attempted to give to their citizens the whole body of their laws.

Much of what is said in this address is as worthy of the attention of the members of the Law Society of Upper Canada as of the American Bar Association. R.

THF NEW EMPLOYERS' LIABILITY BILL FOR GREAT BRITAIN AND IRELAND.

Sir Frederick Pollock has observed, with not less truth than wit, that the law of England consists of groups of statutes, floating like islands in an ocean of cases. The history of the Employers' Liability Act, 1880, and of the amending Bill which was last year revised by the Standing Committee of Law, and will soon, it may be hoped, receive the Royal assent, is an admirable illustration of the great English jurist's simile.

According to the common law of England—affirmed by a series of decisions from *Priestly* v. *Fowler*, in 1837, downwards—a master was not answerable to one servant for an injury arising from the negligence or misconduct of another in the same "common employment," upon the ground that the possible negligence of a fellow-servant is a risk which every employee deliberately undertakes to run, and of which, therefore, upon the venerable authority of the maxim, *volenti non fit injuria*, he has no legal right to complain. This doctrine of common employment, in its extreme form, the Scotch courts refused to recognize, till it was made binding upon them by the decision of the House of Lords, on appeal from the Court of Session, in the case of the *Bartonshill Coal Co.* v. *Reid* in 1858. In that case, the deceased, a miner in the employment of the appellants, was being drawn up the shaft in the cage or cradle of the works by a fellow-servant, Shearer. This man failed to stop the engine at the proper time. The cage, sent with great force against the scaffolding, was overturned, and the unfortunate Reid, precipitated from the height of fifty feet, was immediately killed. The Scotch judges held that Shearer was not a fellow-workman of the deceased, because their work was quite different in character—the one excavating coal, the other managing

machinery—and drew the very fine distinction between "common employment" and "superintendence," to which the Employers' Liability Act, 1880, subsequently gave an imperfect expression. Reid's representatives, therefore, recovered damages against the company, and the company appealed to the House of Lords, whose judgment reversed the decision of the Court below, and definitely incorporated the doctrine of "common employment" into the law of Scotland. "Where several workmen," said Lord Cranworth, "engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risk of carelessness against which their employer cannot secure them, and they must be supposed to contract with reference to such risks. To constitute fellow labourers it is not necessary that the workman causing, and the workman sustaining, the injury should both be engaged in perfectly the same or similar acts. The driver and guard of a stage coach, the steerer and rower of a boat, the workman who draws the red hot iron from the forge and those who hammer it into shape, the engine-man who conducts a train and the man who regulates the signals, all are engaged in common work."

Public attention, however, had been aroused; a few instructive object-lessons on the hardship of the rule were given; and after the inevitable Committee of Enquiry had been appointed and reported, and the abortive measure, which seems an almost necessary prelude to useful legislation in this country, had been duly introduced and withdrawn, the Employers' Liability Act, 1880, passed into law. The provision of that modest enactment is well known to every student of law, and need not be here described. Perhaps no modern statute, with the exception of those—happily unfamiliar to colonial lawyers—which regulate bills of sale, has given rise to such difficulties as the Employers' Liability Act, 1880.

Ostensibly aimed against the doctrine of "common employment," its attack upon that doctrine was a mere half-hearted repudiation of some of its crudest applications. No new regulating principle was enunciated. No adequate definition of even its own terminology was offered; and the procedure by which the statutory remedies were to be enforced was technical and unsatisfactory to the last degree. The result was inevitable. In a few years an ocean of cases had submerged the little island raised by the ingenuity of the legislature as a basis for the doctrine of employers' liability, and the reign of chaos was restored. The new Employers' Liability Bill, now in a state of suspended animation, and ready to replace the statute of 1880, whose sickly existence has been prolonged to the 31st of December of this year by an Expiring Laws Continuance Act, is a much more satisfactory measure than its predecessor.

The following summary may serve the double end of emphasizing the defects of the old law and illustrating the mode in which it is now proposed to remedy them.

1. The benefits of the new Act are extended to tramway servants.*
2. A workman is not to be deemed to have incurred the risk of injury volun-

* In the case of *Cook* v. *The North Metropolitan Tramway Co.*, 18 Q.B.D. 683, it was held that a tramcar driver was not a workman within the meaning of the Employers' Liability Act, 1880.

tarily, only because he continued in the employment of his employer with knowledge of the defect, negligence, act or omission, which caused his injury.*

3. An action will now lie against the representatives of a deceased employer.

4. Contracts surrendering the benefits of the Act are void† unless made in pursuance of a request in writing by the workman, and unless it be shown that the employer undertook to make, so long as the workman continued in his service, an adequate contribution to the insurance of the workman, and has duly fulfilled such undertaking. On an application by a workman or the employer of a workman (*a*) in any coal mine, metalliferous mine, factory, or workshop, or (*b*) in any other employment, a Secretary of State in the former case, and the Board of Trade in the latter, may decide whether a proposed contract is good, and not that contract alone but other similar contracts shall be governed by the decision without further proof.

5. The benefits of the Act are extended to seamen, except that if a seaman is injured elsewhere than in a port of the United Kingdom, (*a*) the employer is not liable unless the injury arose from a defect in the condition or equipment of the ship, existing at the time when she last proceeded to sea from a port in the United Kingdom, and the defect or failure to discover it arose from the negligence of the employer or some person entrusted by him with authority on that behalf, and (*b*) it shall be a valid defence for the employer to show that the ship or its equipment was in accordance with the rules of the Board of Trade at the time of last proceeding from a port in the United Kingdom.

That the new Act will not itself be affected by the involuntary legislation which suitors initiate, cannot of course be affirmed, but it appears to be a well-drafted and comprehensive measure, framed with an intelligent appreciation of the defects of the existing law.

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THE CURRICULUM OF THE LAW SCHOOL.

At last the Law School, so long in contemplation and the theme of such manifold discussions, is about to become an accomplished fact. The learned Principal, after a tour of investigation among similar institutions in the United States, and with such assistance as he has been able to avail himself of, has the satisfaction of seeing the institution over which he is to preside assume definite form. A curriculum and course of instruction for the school have been drawn up, submitted to the Legal Education Committee, recommended by that committee for the consideration of Convocation, and finally approved by that body and issued for the information of those interested in the school.

We are glad that the scheme is at last practically in operation, and that the Law Society is for the future to be something more in relation to legal education

*This provision gives legislative validity to the decision in *Thrussell* v. *Handyside*, 20 Q.B.D. 359.

†C.P. *Griffiths* v. *Lord Dudley*, 9 Q.B.D. 157.

than a mere organizer of examinations. If the legal profession is to keep abreast of other learned professions and of the community, instruction in law is a necessity, and under existing circumstances all attempts at securing such instruction from other sources than the Law Society have been abandoned.

One cannot help remarking that, so far as can be learned from the curriculum, no changes have been made in the requirements for entrance into the Society. We have before now strongly urged the great need of a higher standard of literary qualification for admission as a student-at-law or articled clerk. The legal profession admits students of lower scholastic attainments than any other learned profession in this Province. We sincerely hope that along with the general revision of the curriculum which has come with the inauguration of the Law School we shall have a complete revision of the qualifications for entrance on the study of law, and that knowledge and training worthy of the profession will hereafter be required.

The new curriculum is, as regards the books to be read and the subjects to be studied, a decided improvement on its predecessor. Among the works added to the course are Kerr's Student's Blackstone, 4 vols., Deane's Principles of Conveyancing, Leake on Contracts, Bigelow on Torts, H. A. Smith's Principles of Equity, Powell on Evidence, Bourinot's Manual of the Constitutional History of Canada, Lewin on Trusts, Pollock on Torts, Smith on Negligence, Chalmers on Bills, Westlake's Private International Law, and Hardcastle's Construction and Effect of Statutory Law. Those who, like ourselves, think that some attention should be given to the science of jurisprudence, the foundation and development of law, Roman law, and comparative jurisprudence, will be disappointed. One would think that those engaged in a calling which lays claim to the dignity of a learned profession should know something of the scientific aspect of the various subjects within the field of that profession.

Every Canadian, and *a fortiori* every Canadian lawyer, should be versed in the constitutional history of his country. We are glad that a manual on the subject has been placed in the curriculum, and that its teachings are to be supplemented by lectures and by the study of the B.N.A. Act and the cases under it. If the primary examination included a thorough knowledge of Canadian history generally, there would be a much better prospect of thoroughness in constitutional history and law.

One of the objections heretofore strongly urged against any scheme under which the universities would do most, if not all, of the teaching in the principles of law and leave the Law Society to furnish practical training, was that under such a division of the work, so much of the student's time would be taken up in making theoretical acquisitions that it would be impossible for him to become even fairly familiar with the practice of the profession. It seems to us that the curriculum of the Law School may be open to the same objection. The time of every student will be taken up during the term with the lectures, discussions, questions, etc., of the school for two hours daily, and these hours are so arranged as to interfere seriously with any office work that a student might feel disposed to do. The time of attendance, *i.e.*, from the fourth Monday in September until

the first Monday in May in each of the last three years of the time spent under articles, is to be counted as service under articles, and it is further declared in the curriculum that "during his attendance in the school the student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable students will be provided with room and the use of books for this purpose." Some provision is made, however, to remove the difficulty. Moot courts are to be held. In the first year of the course two hours on every alternate Friday, and in each of the following years two hours every Friday, are to be spent in this way. As far as one can judge from the somewhat meagre information supplied by the curriculum, the moot court will be a weekly argument on a case to be stated by the Principal or Lecturer, who is to preside, and it will be upon upon the lectures then in progress. Two students on each side of the case will be appointed by the Principal or Lecturer to argue it. This exercise seems to be about the same in character and value as a legal debating club in which the subjects are assigned by the chairman, and it is compulsory to take one's turn. A graduate's only other chance of gaining a knowledge of the practice, if he is in Toronto, is from May to October in each year under articles, and this time is broken in upon by the long vacation. He will, for all practical purposes, have spent rather less than nine months in an office, excluding long vacations, and will have taken part in arguments with a frequency varying inversely as the numbers in attendance. The five-year man will have the somewhat questionable advantage over his more scholarly fellow-student of having spent two years in an office before acquiring any law. Much may be done by the Principal and Lecturers to remedy what, if the school were carelessly conducted, would be a serious evil. Cases may be stated in which the student may be required to issue writs, draw pleadings, suggest amendments, and a score of other things all tending to give practical skill. We point out the danger, not because we are sure that it is inevitable, but because, ardently desiring the success of the school, we wish the evil to be guarded against. The enthusiasm, judgment and skill of the Principal and Lecturers will, we doubt not, be exercised to avert it.

Another phase of the same matter is the effect of the school, as organized, on the office routine of the legal practitioner. Here, we think, the result will be some inconvenience, with much permanent good. Many lawyers in active practice have encouraged young men to study law, rather than discouraged them, the object being to secure help in doing the routine work of the office. The absence of the law student for nearly eight months of the year, during the last two or three years of his indentures, must detract materially from his value as an office assistant, and young lawyers and paid clerks will probably find themselves in greater demand. Salaried students will also cease to be. There will be some increase in the student's outlay in all cases, and in many instances a material increase. There will probably be a diminution of the number entering the profession. Possibly some of the evils of over-crowding may be removed. The effect

on the larger firms may be to increase their expenses, on the smaller and newer ones to increase their work and income.

The attendance at lectures is compulsory, a faithful record of those present being kept; and a student, in order to have his name certified to the Legal Education Committee, must appear by the record to have duly attended at least five-sixths of the aggregate number of lectures, including moot courts, and at least four-fifths of the number of lectures, including moot courts, of each series delivered during the term and pertaining to his year. Special cases arising from illness or similar cause are to be investigated by the Principal and reported upon by him to the Committee. The examinations are to be held immediately after the close of the term, upon the subjects and text-books embraced in the work of that term and laid down in the curriculum. Special examinations are also to be held early in September for students who were not entitled to present themselves in May, or who then failed to pass their examination. The examination of each term must be passed before entering on the work of the succeeding one, and the final examinations of the school are to entitle the student to be called to the Bar or admitted as a Solicitor without further examination.

It has been announced that two Lecturers have been appointed at a yearly salary of $1,500 each, and two examiners at a salary of $700 each for the first year. A salary of $500 was at first proposed for the examiners, but it was concluded that as they would have more than two examinations per year for some time to come, on account of the number of students exempt from attendance at lectures and entitled to take them at the old times, this should in the meantime be increased. We think that, having regard to their respective duties, the examiners are better paid than the lecturers. The time of the latter will be badly broken into by lectures during those portions of the day most valuable for professional work. It seems to be intended that the Principal shall deliver one-half, and each of the Lecturers one-fourth, of the whole number of lectures in each year. With this object the subjects of each term are divided into four groups, each being the basis of a series of lectures. Two of these series are to be taken up by the Principal and one by each of the Lecturers; and, though it is not definitely stated, it would seem to be implied that only one series of lectures will be in progress in each year at the same time. This will give each Lecturer two hours' work per day while his lectures are in progress. Since the Principal is to do twice as much work as either of the Lecturers, it follows that each Lecturer will lecture in the aggregate for only one-half of the term, and the Principal must lecture on the average four hours per day.

Our readers must have observed that, as the new rules were originally drawn up, the attendance at the school must of necessity have been very small. By far the greater number of those now on the books of the Law Society were exempt, wholly or in part, from attendance. We have already summarized these exemptions (see *ante* p. 357). It appears to have been decided by the Law Society, at the last moment almost, that these exemptions were too numerous, and that, if the officers of the school were to have anything to do during the present term,

the exemptions must be reduced in number. Accordingly, at a meeting of Convocation held on September 21st, certain Rules were passed, of which the Secretary was instructed to give the students immediate notice. The object of these Rules is to increase the attendance during the first term of the school. This result is sought in three ways. All students and articled clerks in Toronto who are entitled to present themselves for either the first or second Intermediate Examination in any term before Michaelmas Term, 1890, must attend the school during the session of 1889-90, and take the examination at the end of the school term. All students and articled clerks outside of Toronto who are entitled to present themselves for either the first or second Intermediate Examination in any term before Michaelmas Term, 1890, may attend the school during the session of 1889-90, and take the examination at the end of the school term. Honours and scholarships on the first and second Intermediate Examinations are to be awarded only at the examinations of the Law School, and the number of scholarships is increased, there being one of one hundred dollars, one of sixty dollars, and five of forty dollars. The Legal Education Committee may, under special circumstances, relieve any student or clerk from compulsory attendance under the Rule of 21 September. The session will not begin this year until 7 October. The attendance will be somewhat small for two years, notwithstanding the recent change. Then numerically the school will become a flourishing institution, and we hope that it will leave lasting monuments of its usefulness in the profound legal scholarship and distinguished career of many of its pupils.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We continue the Law Reports for July comprised in 23 Q.B.D., pp. 1-135; 14 P.D., pp. 73-85; and 41 Chy.D., pp. 213-438.

INFANT—GUARDIAN—NATIONALITY—ALIEN—FRENCH SUBJECT—NATURALIZATION.

In re Bourgoise, 41 Chy.D. 310, was an application to appoint a guardian to some infants resident in France who were entitled to a considerable amount of personal property in England. Before his marriage, the father of the infants, who was a Frenchman, came to reside in England in 1871 and obtained the usual qualified certificate of naturalization as a British subject under The Naturalization Act of 1870, s. 7, but he did not obtain the consent of the French Government to his becoming naturalized as a British subject. In 1880 he married an English lady and then returned to France where he resided until his death on 18th August, 1886. His will was made in French form, and by it he gave his residuary estate, which included considerable personal estate in England, to his widow for life, with remainder to his children, the infants in question; the widow died and a guardian was appointed to the infants by the French Courts. Kay, J., refused to interfere by appointing a guardian in England, because he considered the father was at the time of his death a French subject, and therefore the Court had no

jurisdiction; and the Court of Appeal (Cotton, Lindley, and Bowen, L.JJ.) thought, irrespective of the question whether the father had not been duly naturalized, that as the children had been born in France and were resident in France, and the French Court had assumed jurisdiction over them by appointing guardians for them, the English Courts should not interfere.

PRACTICE—SOLICITOR—ACTION ON UNTAXED BILL.

In *Lumley* v. *Brooks*, 41 Chy.D. 323, a question was raised as to the proper form of a judgment to be entered in the action, which was brought on a solicitor's untaxed bill. The defendant had pleaded a counter claim, but no one appeared for him at the trial. The plaintiff proved his retainer. Kay, J., held that the bill must be taxed, and to this the defendant did not object, but asked to have judgment for the amount to be found due; but Kay, J., made a simple order for the taxation, reserving further directions and costs. This the Court of Appeal (Cotton, Lindley, and Bowen, L.JJ.) were of opinion was less than the plaintiff was entitled to, and they varied the judgment by dismissing the counter claim with costs, ordered the bill to be taxed, and defendant to pay plaintiff the amount the master should certify to be due, together with the plaintiff's costs of the action.

SOLICITOR—COSTS—TAXATION—BILL DELIVERED MORE THAN TWELVE MONTHS—SOLICITOR'S ACT, 6 & 7 VICT., C. 73 S. 37—R.S.O., C. 147, S. 34.

In re Park, Cole v. *Park*, 41 Chy.D. 326, is another decision relating to the taxation of a solicitor's bill. In this case the action was brought to administer a deceased person's estate; and a firm of solicitors brought in a claim for £221, 3s. 1d., as the balance due on certain bills of costs delivered by them to the testator more than twelve months before his decease. The executor disputed some of the charges, and the Chief Clerk decided to refer the bill to a taxing master, from which decision the solicitors appealed, and Sterling, J., though of opinion as twelve months had elapsed since delivery and no special circumstances were shown, the bill could not be referred to taxation under the Solicitor's Act; yet, notwithstanding, it should be referred to the Taxing officer to inquire and state whether any and which of the particular items objected to, were fair and proper to be allowed, and to what amount. The Court of Appeal (Cotton, Lindley, and Fry, L.JJ.) sustained his order.

PRACTICE—AMENDMENT—ADDING PLAINTIFF—ORD. 16, R. 2—(ONT. RULE 445).

In *Ayscough* v. *Bullar*, 41 Chy.D. 341, the Court of Appeal (Cotton and Lindley, L.JJ.) reversed a decision of North, J., on a point of practice. The action was brought to enforce a restrictive covenant against building in a particular manner. After the commencement of the action, the plaintiff was advised that as her property had, after the making of the covenant in question, become vested in the covenantor through whom she derived title, there might be some difficulty on that account, in the way of her maintaining the action, and she applied for leave to amend by adding as a co-plaintiff the proprietor of an adjoin-

ing property, who was entitled to the benefit of the covenant. North, J., refused the amendment; but the Court of Appeal thought there had been a *bona fide* mistake in bringing the action in the name of the plaintiff instead of the person proposed to be added, and therefore allowed the amendment, but terms were, however, imposed that the original plaintiff should pay the costs of the application, and also the costs of the action up to the time of the amendment, if it should appear at the trial she was not entitled to maintain the action; and further, that the party added should only be entitled to such relief as he could have got had the action been commenced at the date he was added as a party.

PROSPECTUS—MISREPRESENTATION—ACTION OF DECEIT—CIRCULAR TO CORRECT ERROR IN PROSPECTUS.

Arnison v. *Smith*, 41 Chy.D. 348, is a decision of the Court of Appeal (Lord Halsbury, L.C., and Cotton and Lindley, L.JJ.) affirming a decision of Kekewich, J., which, to some extent, follows on *Peek* v. *Derry*, 37 Chy.D. 541, which is assumed to be good law, but the recent reversal of that case by the House of Lords (see *English Law Times*, 6th July, 1889) will make it necessary for the practitioner to reconsider this decision by the light of the principles laid down by the Lords in *Peek* v. *Derry* before relying on it as an authority. In this case the misrepresentation in the prospectus was that £200,000 of share capital had been subscribed, when in fact it had only been allotted in fully paid-up shares to the contractor for the construction of the Company's works. Subsequently another circular was issued to the allottees of stock, which, amid statements about other matters, stated the truth as to the matters misrepresented, but did not admit the misrepresentation nor inform the allottees that they could retire and get back their money. The concern having proved a failure, some of the allottees sued the directors for misrepresentation, and they were held entitled to recover; but in the absence of any fraudulent intent being established we very much doubt whether this case can now be considered to be good law. According to the House of Lords, a misrepresentation, in order to be actionable, must have been made either (1) knowingly, (2) without belief in its truth, or (3) recklessly and without care whether it be true or false. Some of the plaintiffs failed to appear at the trial, and Kekewich, J., ordered them to pay the defendant's costs occasioned by their being joined as plaintiffs; the Court of Appeal, however, varied the judgment as against these plaintiffs by making it without prejudice to their bringing a new action.

MORTGAGE—PROVISO FOR REDUCTION OF INTEREST—ACCOUNTS—RIGHT TO HIGHER RATE OF INTEREST—MORTGAGEE IN POSSESSION.

In *Bright* v. *Campbell*, 41 Chy.D. 388, a mortgagee went into possession when there was no interest in arrear, and received the rents and profits which he applied in reduction of the amount due on the mortgage. The mortgage contained a covenant in the usual terms, whereby the mortgagee agreed to accept a lesser rate of interest on punctual payment. In taking the accounts of the mortgagee in possession, the question arose whether, under the circumstances, the mortgagee was bound to accept the lesser rate of interest. Kay, J., (following *Union*

Bank v. *Ingram*, 16 Chy.D. 53, and *Cockburn* v. *Edwards*, 18 Chy.D. 449, 457) held that the covenant did not apply to a receipt of rents by a mortgagee, and therefore that he was entitled to the higher rate, notwithstanding the covenant. He doubted, however, whether he would have independently come to the same conclusion.

DOMICIL—INTESTACY—LEX LOCI—LEASEHOLDS—DEVOLUTION OF UNDISPOSED OF ENGLISH LEASEHOLDS BELONGING TO DOMICILED SCOTCHMAN.

Duncan v. *Lawson*, 41 Chy.D. 394, was a case submitted by a Scotch Court, the question being, by what law of devolution certain English leaseholds undisposed of by the will of a domiciled Scotchman were to be governed, whether, as other personal property, by the law of the domicil, of the testator, or as realty by the *lex loci rei sitæ*. Kay, J., determined that they were governed by the latter, and therefore the persons beneficially entitled to take, were the next of kin of the testator, according to the English Statute of Distributions.

COMPANY DEBENTURE MORTGAGE—IMPLIED POWER OF SALE—CONVEYANCING AND PROPERTY ACT, 1881 44 & 45 VICT., C. 41, S. 19, R.S.O., C. 102, S. 18.

In Blaker v. *Herts & Essex Waterworks Co.*, 41 Chy.D. 399, the plaintiffs were mortgagees of the defendant Company's works, etc., under certain debentures issued by them, and the plaintiffs claimed by virtue of the Conveyancing and Property Act, 1881, s. 19 (R.S.O., c. 102, s. 18) that a power of sale was implied in their mortgage, which they claimed the right to enforce, but Kay, J., was of opinion that as the waterworks undertaking was for a public purpose and not a mere private undertaking, the principle of the decision in *Gardner* v. *London, Chatham & Dover Ry.*, 2 Chy., 201, was applicable, and that the debentures did not confer on the holders a power to sell the undertaking; and he therefore refused to direct a sale, or to continue the appointment of a manager who had been appointed upon an interlocutory application in the action, but he directed the usual accounts and inquiries and appointed a receiver.

WILL—CONSTRUCTION—SURVIVOR.

In re Roper, Morrell, v. *Gissing*, 41 Chy.D. 409, Chitty, J., was called on to construe a will, whereby a testator bequeathed a sum of money to be invested in consols to provide annuities of a specified amount for his widow and four children, and directed that on his widow's death her annuity was to be distributed among his four children; and if either child died, then one-fourth of the fund of consols was bequeathed to the child or children of the deceased child absolutely, and in the event of either of his children dying without issue, he gave the "fourth part or share to which the children of such dying child would have been entitled, unto the survivors of my said children in equal shares." The will contained a residuary gift. One of the testator's children survived the rest, and the question arose on his death, who was entitled to his one-fourth of the fund? Chitty, J., decided that he had become absolutely entitled to the fund as the longest liver, and consequently that his fourth belonged to his representatives.

POWER OF APPOINTMENT—EXERCISE BY WILL—CONTRARY INTENTION—WILLS ACT 1 VICT., C. 26 S. 27—(R.S.O. C. 109, S. 29).

In re Philips, Robinson v. *Burke*, 41 Chy.D. 417, Chitty, J., had to determine whether a power of appointment had been executed by will, whereby the testator gave all his leasehold estates and personal estate and effects whatsoever and wheresoever to his executors in trust in favor of other persons than those entitled in default of appointment. The settlement which contained the power of appointment was made by the testator in 1880 and provided that the trustees were to hold the property subject as he might order and direct in writing (but not by will, unless he should expressly refer therein to the trust premises) and subject thereto, in trust for R. and her children. The will was dated before the settlement, viz.: in 1879. Under these circumstances, and having regard to the terms of the settlement, Chitty, J., was of opinion that the power was not executed by the will.

PRINCIPAL AND SURETY—RELEASE OF SURETY—TIME GIVEN TO PRINCIPAL DEBTOR.

The only remaining case to be noted is *Clarke* v. *Birley*, 41 Chy.D. 422. In this case the principal debtors and six sureties had given a deed in December, 1872, to the bankers of the principals, covenanting to pay to the bank the balance due by the principals, not exceeding £25,000. In January, 1876, there being then about £26,000 due from the principals, one Heath agreed to pay off £15,000 of the amount, upon the terms that he should be entitled to a charge on certain deeds held by the bank to secure the repayment of the £15,000, and also the benefit of any covenant contained in the deed of December, 1872, except so far as it imposed any burden on the sureties, and the sureties were discharged from any liability for the £15,000 paid by Heath. It was claimed that this agreement had the effect of reducing the liability of the sureties to the Bank to £10,000, as regards any balance which might thereafter become due to the Bank; but North, J., held, that though they were thereby discharged from liability to the extent of £15,000 of the balance due, they nevertheless remained liable to the extent of £25,000 in respect of any future balance accruing due to the Bank. Three of the sureties and a third person subsequently gave the bank a continuing guarantee to the amount of £8,000, of which the sureties were liable for £2,500 each, in consideration of the bank for one year continuing to make advances to the principals. The principal debtors were not parties to the arrangement, nor did the creditors execute the agreement, though they acted on it. It was contended by the other sureties who were not parties to it, that they were released because the agreement had the effect of giving time to the principals; North, J., held that they were not released because there was no binding contract to give time to the principal debtors, which the latter could enforce. He moreover held that the effect of the agreement was to increase the liability of the sureties, who were parties to it in the proportion of the £2,500, even though the debt due by the principal debtors to the Bank should not be increased beyond the limit of £25,000.

The Law Reports for August comprise 23 Q.B.D., pp. 133-263; 14 P.D., pp. 85-130; 41 Chy.D., pp. 437-577, and 14 Appeal Case, pp. 105-336.

ELECTION—NOMINATION PAPERS—SIGNATURE—ADDITION OF WORD "JUNIOR."

In *Gledhill* v. *Crowther*, 23 Q.B.D. 136, it was held by Mathew and Grantham, JJ., that the addition of the word "junior" to the signature of a nominator to a nomination paper did not have the effect of invalidating the nomination, notwithstanding that the name of the nominator appeared on the register without the addition, that being the usual signature of the nominator.

MUNICIPALITY—CHARGE ON PREMISES FOR LOCAL IMPROVEMENTS—STATUTE OF LIMITATIONS.

Hornsey Local Board v. *Monarch Investment Society*, 23 Q.B.D. 149, was an appeal from a County Court. Under a statute certain expenses incurred by a municipal body were made a charge on the premises in respect of which the same were incurred. Mathew and Grantham, JJ., held that this charge must be enforced within the twelve years allowed by the Real Property Limitation Act, 1874; and that the period began to run from the date when the expenses were incurred.

BIGAMY—SECOND MARRIAGE WITHIN LESS THAN SEVEN YEARS AFTER HUSBAND OR WIFE LAST HEARD OF —HONEST BELIEF ON REASONABLE GROUNDS, OF DEATH OF HUSBAND OR WIFE—24 & 25 VICT., C. 100, S. 57—R.S.C., C. 161, S. 4.

In the *Queen* v. *Tolson*, 23 Q.B.D. 168, a very strong court, numerically, was summoned to dispose of an important question of criminal law upon a case stated and reserved by Stephen, J. The question being, whether a woman who had gone through the form of marriage a second time, within less than seven years after her husband had been last heard of, under a *bona fide* belief on reasonable grounds that he was then dead, could be properly convicted of bigamy. The majority of the Court, Lord Coleridge, C.J., Hawkins, Stephen, Cave, Day, A. L. Smith, Wills, Grantham, and Charles, JJ., held that she could not; but a strong minority, consisting of Denman, Field, and Manisty, JJ., and Pollock and Huddleston, B.B., dissented. This case may be taken as authoritatively settling the law on this important point, on which there were conflicting decisions. *Reg.* v. *Turner*, 9 Cox C.C. 145, *Reg.* v. *Horton*, 11 Cox C.C. 670, and *Reg.* v. *Moore*, 13 Cox, C.C. 544, being in favour of the view adopted by the majority of the Court; while *Reg.* v. *Gibbons*, 12 Cox, C.C. 237, *Reg.* v. *Bennett*, 14 Cox, C.C. 45, and *Reg.* v. *Prince*, L.R. 2, C.C.R. 154 were opposed thereto. The judgments of Wills and Stephen. JJ., are interesting for the discussion they contain on the maxim *actis non facit reum, nisi mens sit rea*, and the limitations to which it is subject.

CRUELTY TO ANIMALS—DISHORNING CATTLE—INFLICTION OF UNNECESSARY PAIN.

Ford v. *Wiley*, 23 Q.B.D. 203, was a prosecution to recover a penalty under 12 & 13 Vict., c. 92, s. 2, for cruel treatment of oxen by dishorning them. The evidence proved that the act of dishorning was accompanied by great pain and

suffering to the animal dishorned. The defendant attempted to excuse the practice by proof that dishorning changed the character of animals by rendering them quiet and preventing them goring or ill-treating others, made them graze better, and fatten more quickly, enabled a greater number to be stowed in a yard or railway truck, and slightly increased the value of each animal. But the Court, on the whole evidence, came to the conclusion that the operation of dishorning caused extreme pain without adequate and reasonable object, and was an unnecessary abuse of the animal, and therefore unjustifiable.

PRACTICE—APPEAL FROM ORDER REFUSING A PROHIBITION—NEW TRIAL IN ACTION IN COUNTY COURT STRUCK OUT FOR WANT OF JURISDICTION.

In *Lister* v. *Wood*, 23 Q.B.D. 229, it was held by the Court of Appeal (Fry and Lopes, L.JJ.) that an appeal will lie without leave to that Court from the decision of a Divisional Court, or an application for a prohibition to an inferior Court. And it was also held that where a County Court judge had struck out a cause on the ground of want of jurisdiction, and on a subsequent application being of opinion that his decision as to jurisdiction was erroneous, ordered a new trial, that he had power to order a new trial.

PRACTICE—GARNISHEE ORDER—ATTACHMENT ORDER—BALANCE IN HANDS OF GARNISHEE.

Rogers v. *Whitley*, 23 Q.B.D. 236, was an action brought against the defendant for dishonoring the plaintiff's cheques. It appeared that the defendant acted as banker for the plaintiff, but that before the cheques in question were presented "all debts" due by the defendant to the plaintiff had been attached to answer a judgment recovered by a third person against the plaintiff. It appeared that there was a balance in the defendant's hands beyond what would be sufficient to satisfy the judgment of the attaching creditor, but it was held by the Court of Appeal (Lindley and Lopes, L.JJ.) that so long as the attaching order remained in force the defendant was justified in refusing to honor any of the plaintiff's cheques.

ASSIGNMENT OF DEBT—MORTGAGE—CHARGE—JUDICATURE ACT, 1873, S. 25, S.-S. 6—(R.S.O., C. 122, S. 7.)

In *Tancred* v. *Delagoa Bay & East Africa Railway Co.*, 23 Q.B.D. 239, a Divisional Court, composed of Denman and Charles, JJ., were called on to determine whether an assignee by way of mortgage of an award was entitled to sue to recover it in his own name. The question had been previously considered by Pollock, B, in *National Provincial Bank* v. *Harle*, 6 Q.B.D. 626, and subsequently by Day and A. L. Smith, JJ., in *Burlinson* v. *Hall*, 12 Q.B.D. 347, in which different decisions had been arrived at; in the latter case it had been held that an absolute assignment of a *chose in action* by way of mortgage was not "an assignment by way of charge only," and therefore that the mortgagee was entitled to sue for its recovery in his own name, and this decision was now followed in preference to that of Pollock, B. The distinction between an assignment by way of mortgage and an "assignment by way of charge only," is thus

stated by Denman, J,, at p. 242: "A document given 'by way of charge' is not one which absolutely transfers the property with a condition for reconveyance, but is a document which only gives a right to payment out of a particular fund or particular property, without transferring that fund or property."

BILL OF EXCHANGE—FORGERY OF NAME OF PAYEE—"PAYEE A FICTITIOUS OR NON-EXISTING PERSON"—BANKER, LIABILITY OF, FOR PAYING ON FORGED INDORSEMENT—NEGLIGENCE.

In *Vagliano* v. *The Bank of England*, 23 Q.B.D. 243, which we noted, ante p. 146, when before Charles, J., his judgment has been affirmed by the majority of the Court of Appeal (Cotton, Lindley, Bowen, Fry, and Lopes, L.JJ.), the head of the Court, Lord Esher, M.R., however, dissented. It may be remembered that the action was brought by the acceptors of bills of exchange for a large amount, for a declaration declaring that the defendants were not entitled to debit the plaintiffs with the amount of these bills which they had paid upon a forged indorsement of the names of the payees. The bills in question were purported to be drawn by a foreign customer of the acceptors in favour of another foreign firm, and were presented to the acceptors in the ordinary course of business and accepted by them. The names of the drawers, however, were in fact forged by a clerk in the acceptor's employment, and after procuring the plaintiff's acceptance this clerk then forged the names of the payees and procured payment of the bills. The point on which the Court differed was whether the payees were to be regarded as real or fictitious persons. There was a firm of the name of the payees, but they had nothing whatever to do with the bills, their names being inserted as payees by the forger of the name of the drawers. The majority of the Court were of opinion that the payees were real and not fictitious persons, and therefore the bank was precluded from charging the plaintiffs with bills paid on the forged indorsement. On the other hand Lord Esher, M.R., was of opinion that the bills in question were not really bills of exchange for lack of a real drawer or a real payee, but that the plaintiffs by their acceptance were estopped from disputing the validity of the signature of the drawer of the bills, but as under the Bills of Exchange Act, 1882 (45 & 46 Vict., c. 61), s. 7, ss. 3, "where the payee is a fictitious, non-existing person, the bill may be treated as payable to bearer," he was of opinion that the bank was entitled to charge the plaintiffs with the bills, because though there was a real firm of the name of the payees, yet as regards these bills it was never intended that that firm should have, and they never did have, any right to the bills in question, and therefore, as regards these bills, were fictitious payees, and the bills were, therefore, under the Act above referred to, payable to bearer, and therefore the bank was entitled to charge the plaintiffs with the bills. Considering the immense sum involved, and the difference of opinion in the Court of Appeal, there can be little doubt that the case will be carried to the House of Lords.

SHIP—CHARTER PARTY—LIABILITY OF OWNERS.

The only case necessary to be noticed in the Probate Division is *The Durham City*, 14 P.D. 85. This was an action by a master against the owners of a vessel

to recover the price of coals procured for the use of the vessel. By a charter party it was agreed that the owners should keep the vessel in an efficient state during the term of the charter-party, and also that if in consequence of a breakdown of its machinery the vessel put into a port other than that to which she was bound, "port charges, pilotages, and other expenses" should be borne by the owners. The steamer put into Vigo, a port to which she was not bound, in consequence, as was alleged by the master, of a breakdown of the condenser. While at Vigo the coals in question were purchased for the use of the vessel. Butt, J., however, held that even assuming that the putting into Vigo was a necessary consequence of the breakdown of the machinery, yet the price of coals supplied to the vessel while she was there was not part of "the port charges, pilotages, and other expenses at the port," and he therefore held that the plaintiff was not entitled to recover.

The only other case in the Probate Division is *Read* v. *The Bishop of Lincoln*, in which those who care to dive into ecclesiastical law will find a learned and elaborate judgment of the Archbishop of Canterbury as to his jurisdiction to try his suffragan bishops for alleged ritual offences.

TRADE MARK—APPLICATION OF WORDS TO A DIFFERENT ARTICLE.

In re Dunn, 41 Chy.D. 439, was an application to register as a trade mark the words "Dunn's Fruit Salt Baking Powder." The words "Fruit Salt" had been used for many years by one Eno, as a trade mark for an effervescing drink, and he opposed the registration. Kay, J., and Cotton, L.J., were of opinion that although Eno had no monopoly in the words "Fruit Salt," and although the words were descriptive, and not in themselves deceptive, yet that their use by Dunn under the circumstances was calculated to deceive the public within the meaning of the *Patents, Designs, and Trade Marks Act*, 1883, s. 73, and therefore that Dunn's application ought to be refused; but the majority of the Court of Appeal (Lindley and Fry, L.JJ.) held that although Dunn had adopted the words "Fruit Salt" on account of the popularity they had acquired through Eno's use of them, yet as Dunn's trade mark was for a totally different article, which did not interfere with Eno's trade, the Court ought not to refuse its registration, which was accordingly allowed.

ATTACHMENT OF DEBTS—AGENT—BANKING ACCOUNT—APPROPRIATION OF PAYMENTS—RULE IN CLAYTON'S CASE.

In *Hancock* v. *Smith*, 41 Chy.D. 456, the Court of Appeal (Lord Halsbury, L.C., and Cotton and Fry, L.JJ.) in overruling North, J., have arrived at a conclusion which certainly seems more in accordance with natural justice than was that which was overruled. The judgment creditor of a stock broker attached a balance at a bank standing to the credit of the broker. The broker disclaimed all beneficial interest in this balance, and admitted that it was the property of certain clients of his in certain specified proportions. It appeared that since money of two of the clients, admitted by the broker to be entitled to the balance, had been paid in, drawings out in excess of the then balance had been

made, and North, J., was of opinion that under the rule in Clayton's case, the moneys so drawn out must be deemed to be appropriated to the moneys so paid in for these clients; but the Court of Appeal held that though the rule in Clayton's case would apply in case there were any dispute between the *cestius que trust* themselves, if there was not enough to pay them all, it could not be invoked against them by either the broker or by his judgment creditor, the latter having no greater right than the broker.

COMPANY—DIRECTOR'S QUALIFICATION—INJUNCTION.

Perhaps the only point necessary to be noticed in *Bainbridge* v. *Smith*, 41 Chy.D. 462, is this, that the Court of Appeal held that where a plaintiff sues for specific performance of a contract, whereunder he claims to be entitled to act as managing director of a company, and the company, besides disputing his qualification, by a resolution declare that even if he is qualified they do not wish the plaintiff to act as director, the Court will not grant an interim injunction to restrain the company from permitting the plaintiff to act as managing director *pendente lite*. The Court also pronounced an opinion as to the meaning of a director holding shares "in his own right," Cotton, L.J., being of opinion that the director must not only have the legal but also the beneficial right to the shares; while Lindley, L.J., thought that the expression meant that the director must hold the shares in such a way that the company may safely deal with them as his shares.

PRACTICE—SET OFF OF COSTS—SOLICITOR'S LIEN—ORD. LXV., R, 14—(SEE ONT. RULES 1204, 1205.)

In *Blakey* v. *Lathorn*, 41 Chy.D. 518, Kay, J., holds, following *Edwards* v. *Hope*, 14 Q.B.D. 932, that notwithstanding the terms of Ord. lxv. r. 14 (see Ont. Rules, 1204, 1205), a party can not claim the right to set off costs in separate actions to the prejudice of the lien of the solicitor for the opposite party, though he may do so as to costs payable in the same action.

Correspondence.

LANDLORD AND TENANT.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—A "Subscriber" writes to you on the above subject and discusses certain features of what he is pleased to call "the O'Connor Act," now included in c. 143, R.S.O., 1887. In the first place let me say that whatever blame is attachable, or whatever credit may be due, in respect of this legislation, Mr. O'Connor is not entitled to be charged specially with the responsibility of the Act. The Bill Mr. O'Connor introduced was withdrawn by him, and consisted of three lines, and was simply to the effect that distress for rent was thereby abolished. The Legislature never recognized the principle of Mr. O'Connor's

proposed legislation. The basis of the Act, 50 Vict., c. 23, which is now law and to which your correspondent refers, was the Bill introduced by me, the principle of which, taken from a recent Manitoba Act, on the second reading was accepted by the Attorney-General as being a good measure, and in committee subsequently, at Mr. Hardy's suggestion, the general features of a Bill introduced by the Attorney-General, I think, in 1878, were engrafted upon my Bill, and some very important additions were also made. The section number 31 specially referred to was taken from the Attorney-General's Bill, and as it expresses, was in amendment of the Common Law, and was not intended in any way as an amendment to my Bill of the previous year, part of which is now s. 9 of R.S.O., c. 143, except in so far as they are *in pari materia*. I may state, in case your correspondent may not be aware of it, that an Imperial Statute since passed has adopted the principle of our recent legislation on this subject, some evidence at least that we are right, and so far as I have heard any objection to the new law, it comes from the landlord class and not the tenants. I cannot, with the light I have on the subject, see any reason for the contention put forward by the tenant that he is entitled to fifteen days before distress. The entry intended or referred to in s. 31 is the entry for possession and not distress, in my opinion.

Yours respectfully,

Prescott, Sept. 11th, 1889. F. J. FRENCH.

LONG VACATION.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—In common with many members of the profession, I believe that a change in the dates of the beginning and ending of the long vacation is advisable, and that the Judges should be asked to make an alteration. The hot weather is not really felt until the month of July, and it does not require any evidence, at present, that it lasts until the month of September. Then as far as business is concerned, it seem to me that an extension of the time after the spring circuits are over and before vacation begins, during which actions may be commenced and got ready for trial, is necessary. The sittings of the Court of Appeal and of the Chancery Divisional Court would require to be put forward ten days or so, and it might be necessary to re-arrange one or two other matters, but there is no difficulty in the matter which cannot be easily overcome.

Toronto, Sept. 13th, 1889. S.

DIARY FOR OCTOBER.

1. Tues...County Court Non-Jury Sittings exept in York. Maritime Court sits. William D. Powell. 5th C J. of Q.B., 1816.
6. Sun.....*Sixteenth Sunday after Trinity.*
7. Mon....County Court Sittings for Motions, except in York. Henry Alcock, 3rd C.J. of Q.B., 1802. R. A. Harrison, 11th C.J., of Q.B., 1875.
12. Sat.....County Court Sittings for Motions, except in York. end. Columbus discovered America, 1492.
13. Sun.....*Seventeenth Sunday after Trinity.* Battle of Queenston, 1812. Lord Lyndhurst died, 1863, æt. 92.
15. Tues...English law introduced into Upper Canada, 1793.
18. Fri.....St. Luke.
19. Sat.....County Court Sittings for Motions in York end. Last day for notices for Prim. Exam.
20. Sun.....*Eighteenth Sunday after Trinity.*
21. Mon....County Court Non-Jury Sittings in York. Battle of Trafalgar, 1805.
22. Tues...Supreme Court of Canada sits.
23. Wed...Lord Lansdowne, Governor-General, 1883.
27. Sun.....*Nineteenth Sunday after Trinity.* Hon. C. S. Patterson, appointed Judge of Supreme Court, 27th October, 1888. Hon. Jas. MacLennan appointed Judge of Court of Appeal, 27th October, 1888.
29. Tues...Primary Examinations.
31. Thu....Admission of graduates and matriculants. All Hallows' Eve.

Reports.

ONTARIO.

FIRST DIVISION COURT, COUNTY OF RENFREW.

(Reported for THE CANADA LAW JOURNAL.)

RATHWELL *v.* CANADA PACIFIC RAILWAY CO.

Action to recover value of cattle killed by train —Adjoining owner—Township surveyed for settlement and organized—51 Vict., c. 29, s. 194—Township by-law permitting cattle to run at large.

Certain cattle of the plaintiff, whose lands did not adjoin the railway, were at large in the township of Rolph, through which the unfenced railway of the defendants runs. The township is surveyed and organized for settlement, and a by-law of the municipality permits cattle to run at large. The cattle were killed by defendants train.

Held, that the by-law relates only to roads and not to unenclosed lands of private owners, and that the cattle were wrongfully on the track of the railway.

Held, also, that 51 Vict., c. 29, s. 194, gives no right to others than adjoining owners, and those in privity with them, by which they can recover damages through neglect of the Company to fence their line.

DEACON, Co.J., PEMBROKE.

This was an action against the defendants Company to recover $60, the value of two cows of plaintiff, illed by an engine and train of defendants on that part of their line which crosses lot No. 19, in the 3rd concession of Rolph, and came up for trial at the last May sitting of this court, when the counsel for the parties agreed upon the following statement of facts, and arranged for a subsequent appointment to argue the questions of law arising thereon:

1. Plaintiff is the occupant of lot 18 in the 3rd concession of Rolph.

2. Said lot 18 does not touch the railway track within 310 feet. The railway crosses lot 19 and not lot 18.

3. Plaintiff is neither owner nor occupant of lot 19. Reference to plan or sketch annexed to statement.

4. Township of Rolph is organized and surveyed for settlement.

5. There are no fences.

6. Plaintiff's cattle were killed on the railway, having got thereon from lot 19, having first come from 18 on to 19. Accident occurred on 22nd October, 1888.

7. The value of the cattle, $50.

8. Cattle were, at the date of the accident, free commoners in Rolph.

9. No negligence either way.

Burritt for the plaintiff.

White for the defendant.

DEACON, Co.J.—The counsel for the plaintiff conceded that if the law had stood as it was declared to be in the cases of *Conway* v. *C.P.R. Co.*, 12 Ont. Ap. Reports, 708, and *Davis* v. *C. P.R. Co.*, same Vol., 724, the plaintiff would not be entitled to recover, as the cattle had gone upon the track from lot No. 19, of which he was not occupant and to which he had no shadow of a claim. His own lot No. 18, not being in any part touched by the line of railway, and he being in no sense an adjoining proprietor.

But he argued that by the effect of the 194th section of the Railway Act, 51 Vict., chap. 29, which reads as follows, "When a municipal corporation for any township has been organized, and the whole or any portion of such township has been surveyed and subdivided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township, of the height and strength of an ordinary division fence with openings, or gates, or bars, or sliding or hurdle gates, of sufficient width for the purposes thereof, with proper fastenings at farm crossings of the railway, and also cattle guards at all highway crossings suitable and sufficient to prevent cattle and other animals from getting on the railway."

"(3) Until such fences and cattle guards are duly made and completed, and if after they are so made and completed they are not duly maintained, the Company shall be liable for all damages done by its trains and engines to cattle, horses, and other animals not wrongfully on the railway, and having got there in consequence of the omission to make complete and maintain such fences and cattle guards as aforesaid."

That the right of the plaintiff and in fact of each private proprietor in the whole township was enlarged beyond the limits of his own or the land occupied by him to the full extent of the limits of the township, and that he had a right to allow his cattle to roam at their free will and pleasure over the highways and unenclosed lands in the township, and of course go upon the railway line or track if in their rambles they should meet with it.

In support of this contention the plaintiff put in a copy of a by-law of the municipality of Rolph, Buchanan, and Wylie, providing for the allowing of cattle to be free commoners within the townships at certain seasons of the year, and with certain exceptions, not applying to the cattle now sued for.

This by-law was passed as long ago as the 5th of June, 1875, and before the defendants' railway was built through these townships, or even contemplated. Its provisions are somewhat peculiar. Section 1 provides, "That on and after the maturing and passing of this by-law it shall not be lawful for horses, bulls, stags, breachy or unruly cattle, oxen, cows, young cattle, pigs, sheep, geese, and turkeys to run at large or to be free commoners within the limits of the said townships of Rolph, Buchanan, and Wylie, at any seasons of the year. Proviso—that oxen, cows, and young cattle (not being breachy or unruly) shall be at liberty to run at large and be free commoners within the said townships between the 1st day of April and the 1st day of January in each year."

Section 2 provides that "any animal or animals mentioned in the first section of this by-law found running at large contrary to the provisions of the by-law shall be liable to be impounded in one of the public pounds of the said township, and being so impounded the owner or owners of such animals shall be liable to pay the fines and penalties following, that is to say, for each and every cow, ox, or young cattle running at large between the first day of April and the first day of January in any one year, one dollar."

The latter part of clause 2 of this by-law directly contradicts the proviso in clause 1, and renders it at least doubtful what the council really meant to do in regard to cows oxen, and young cattle.

I have carefully compared sec. 194 of the Act of 1888 with sec. 16 of the Act of 1883, for which it is substituted, and excepting only the provision in that section 16 as to the case of the Company taking possession of a section or a lot of land for the purpose of constructing a railway thereon, and being required in writing by the occupant thereof to fence, etc., the obligation to fence, etc., in the other cases is as clear and imperative in one sec. as the other. The phraseology of sec. 194 is certainly different in some respects from that in sec. 16 of which I have spoken; but unless it was to give the municipality, as such, some right to compel a general fencing of the line through the whole of the townships I cannot satisfactorily determine what more, if anything, the Parliament did intend. If it was intended to enlarge the right and privilege of each private proprietor to the extent contended for by Mr. Burrit, why were the words of limitation "not wrongfully on the railway" inserted in sub-sec. 3, and thereby in every case raising and presenting the issue as to whether the cattle were or were not wrongfully on the railway at the time of their being struck and killed? In the present case that issue is fairly and squarely presented. The cattle were either rightfully or wrongfully on the line on 22nd October, 1888. Now, if rightfully, where was the right, and how was it acquired? There is nothing in sec. 194 which speaks of private proprietors or occupants, or gives them any new rights or defines any old ones, in fact, nothing touching them except this sub-sec. 3, which contains the limitation just now mentioned.

If the right is given by the by-law, upon which Mr. Burritt was candid enough to say he did not place very much reliance, then all I can say is that I cannot make out from section 1 and 2 of it (which contradict each other) what this council really intended to do with respect to oxen, cows, and young cattle being allowed to run at large as free commoners. But even if their by-law was ever so clear in its provisions

it must be borne in mind that municipal councils could give no such right or authority over private lands or properties, and certainly not over any part of the railway track itself. Their by-law could only affect the streets, highways, and public squares of their municipality; and even in regard to the highways, the 271st section of the Railway Act would limit their right (so far as allowing cattle to run at large was concerned) to such parts of them as were not within a half a mile of the intersection of the highway with any railway at rail level. On the best consideration I have been able to give the matter I cannot see how the plaintiff's cattle can be said to be rightfully on the track at the time, as they were undoubtedly trespassers on lot 19, from which they got upon the railway, and as the plaintiff has not shown any right for the cattle to be put or go there, I am forced to hold that they were wrongfully on the track of the railway when they were struck and killed, and adopting the language of Mr. Justice Patterson in the Conway case at page 717, when speaking of the change effected by the section 16, then under consideration, it appears to me "there is no evidence of change so great and so uncalled for as to extend the right to either owner or occupant of lands that did not adjoin the railway." And I think the language of Mr. Justice Osler in the same case at page 721 is still, notwithstanding the change in the enactment, applicable to such a case as this: "In the absence of any statutory provision to the contrary a railway company is under no obligation to fence its track. As a general rule, however, railway acts contain enactments more or less stringent requiring them to do so, but unless the duty created by the Act is general, and the obligations imposed unlimited and unqualified, it is only the owners of adjoining lands and those in privity with them who can take advantage of it, and the Company are not bound to make good damages to cattle which were trespassing upon lands which, when they escaped upon the track ought, as between the land owner and the Company to have been fenced."

I have been favored with a perusal of the judgment recently delivered by Mr. Justice Brooks, of the Quebec Superior Court in *Morin* v. *Atlantic & Northwest Railway Co.*, and find that he takes the same view as I do of the recent sec. 194 of the Railway Act.

If Parliament intended making such an extensive change in the law as contended for it should have said so in plain terms and could have refrained from putting in any limitati ns of the right to recover.

A good deal of the language of the judges in *Douglas* v. *Grand Trunk Railway Co.*, 5 App. Rep. Ont. 585, is, I think, still applicable to the position of the plaintiff, even under this new enactment. As to the question of negligence or contributory negligence I do not touch upon it in view of the admission made in the statement, further than to say that I gathered from Mr. Burritt's argument that the absence of negligence as conceded did not include what might be deemed negligence in not having constructed the fences, and from Mr. White's that the want of negligence on the part of the plaintiff did not include what might be deemed negligence in allowing his cattle to roam at large over the lands not belonging to him and unattended and unrestrained.

I think my proper course is to direct a non-suit under the 114th section of the Act; and a non-suit is ordered accordingly.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

KENNEDY *v.* PIGOTT.

Arbitration—Progress estimate—Reference back.

This was an action by a sub-contractor against the contractor of public buildings in Galt, and for a wrongful dismissal. Case was referred to arbitration, and the learned arbitrator (Scott, Co.J.) found in favor of the plaintiffs on a *quantum meruit*, having based the award upon the last progress estimate delivered by the defendant to the Government.

It appeared in evidence that the progress estimate was wrong, and that it did not correctly represent the balance due upon the work. On appeal to the Court of Appeal, the Court unanimously referred the case back to the arbitrator, with directions as to the mode of estimating the amount due, not having regard to such progress estimate.

McCarthy, Q.C., and *W. F. Burton* for the appellant.

Guthrie, Q.C., and *Lash*, Q.C., for the respondents.

This case was since appealed to the Supreme Court and stood over for judgment. The Court has since reversed the Appellate Court, directing that the award as originally made should stand.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Div'l Ct.] [June 22.

MOONEY *v.* SMITH.

Assessment and taxes—Sale of land for taxes—Purchase by wife of treasurer who conducted sale—Sale and conveyance void—Fraud—R.S.O., c. 193, s. 189.

A purchaser of land at a tax sale was made nominally by one G. for the plaintiff, but was in reality made with the money and for the benefit of the plaintiff's husband, the treasurer of the county, who conducted the sale.

Held, in an action of trespass, that the treasurer's position absolutely debarred him from becoming a purchaser at the sale, and the sale and conveyance to the plaintiff were void; and as the land remained in the hands of the persons guilty of the original fraud, the sale was not cured by the provisions of R.S.O., c. 193, s. 189, although it took place in 1883 and the action was not brought till 1889.

G. T. Blackstock for the plaintiff.

Masten and *H. B. Dean* for the defendant.

Div'l Court.] [June 22.

PIZER *v.* FRASER.

Intoxicating liquors—Liquor License Act, R.S.O., c. 194, s. 11, ss. (8) (14)—Petition against issue of license in polling sub-division—Form of petition—Particularity.

The Liquor License Act, R.S.O., c. 194, s. 11, ss. (14), provides that "No license shall be granted to any applicant for premises not then under license, or shall be transferred to such premises if a majority of the persons duly qualified to vote as electors in the sub-division at an election for a member of the Legislative Assembly, petition against it, on the grounds hereinbefore set forth, or any of such grounds.

More than one-half of the electors in a certain polling sub-division petitioned the license commissioners of the district "against the issue of any license within the bounds of said polling sub-division . . . for reasons specified in sec. 11, sub-sec. (8), of the Liquor License Act, R.S.O., or for one or more of such reasons,"—not otherwise specifying any grounds or referring to any applicant or premises.

The plaintiff was an applicant for a license for premises not under license, situate in the sub-division, and the question stated for the opinion of the Court was whether under s. 11, ss. (14), the presentation of the petition precluded the defendants, the license commissioners, from certifying for a license to the plaintiff.

Held, that the petition did not conform to the statute, which requires that the objection shall be to the granting of a particular license, and also that some one or more of the reasons given in ss. 8 shall be set forth, or all of them specifically alleged; and therefore the defendants were not precluded from certifying for a license.

Aylesworth for plaintiff.

J. J. Maclaren, Q.C., for defendant.

Div'l Court.] [June 22.

MAGEE *v.* GILMOUR.

Landlord and tenant—Verbal lease of land—Expiry of term upon day certain—Notice to quit—Sub-lease—Overholding tenants—Warrant of distress—Creation of new tenancy—Payment of rent.

The result of a verbal lease of real property to continue until and expire upon a day certain is that the tenant is bound to give up possession at the end of the stipulated period without any notice to quit. And where McC., the tenant for such a term, sub-let to the defendants, but not for any definite period,

Held, that their term also expired upon the day the original tenancy expired, and when they continued in possession thereafter they were overholding tenants.

The plaintiff, the landlord, issued a distress warrant for rent of the premises in question after the expiry of the term, and the defendants, without the concurrence of McC., who had tried to dislodge them and refused to receive rent

from them since the expiry of the term, paid the rent demanded to the plaintiff's bailiff, not as being due by themselves, but as being due by McC. to the plaintiff. The warrant recognized McC. as being tenant on the day of its date, some months after the expiry of the term, but did not recognize the defendants' rights in any way. In an action of ejectment the defendants disclaimed being tenants under the plaintiff, and insisted that they were still in under McC.

Held, that the payment of the rent did not, under the circumstances, establish a new tenancy between McC. and the defendants, even if McC. ever became the tenant of the plaintiff after the expiry of his original term, which was not shown.

The aintiff, after the expiry of the term served on the defendants a written notice to quit, in which they were recognized as his tenants.

Held, that, having disclaimed being tenants to the plaintiff, the defendants were not entitled to notice to quit, and if they were, the one they received was sufficient.

J. H. Macdonald, Q.C., for the plaintiff.

W. H. Barry for the defendants.

Div'l Court.] [June 22.

RUDD *v.* FRANK.

Evidence—Admissibility—Communications by deceased person to solicitors—Privilege—Judgment for possession of land—Practice on entering—Order of trial judge—Writ of possession—Rules 273, 274, 275, 341, 379, O.J.A—R.S.O., 1877, c. 51, s. 34.

In an action by the devisee of R. to recover possession from the defendant of land conveyed by him to R., of which the defendant remained in possession, the defendant set up that the conveyance to R., though in form absolute, was really intended to operate only as a mortgage, and offered to redeem.

The evidence of E. and P., two solicitors as to statements made to them by R. in his lifetime as to his intentions with regard to the land, was taken subject to objection.

The evidence of E. showed that R.'s statement to him was made in E.'s office, in the presence of P. and of another person who was a a friend of R.'s, but not a professional man. E. thought R. made the statement as a preliminary to instructing him as to something that was to be done by him as a solicitor, but R. did not give any instructions, there was nothing to show that he ever intended to do so, and no professional employment followed from the conversation. E. could not recollect whether he was asked for his advice or opinion at the time; at any rate he made no charge for professional services.

P.'s evidence was that he had spoken to R. about the affairs of F. as the solicitor and friend of the F. family, and had advised R. to try to save the property in question for the F. family.

It also appeared that R. was an occasional client of E. and P., but that in the transactions in question he had employed other solicitors.

Held, that the communications to E. and P. were not made to them in their professional capacity, and were therefore not privileged and were properly receivable in evidence; FALCONBRIDGE, J., doubting as to the evidence of E.

The action was tried without a jury, and the trial judge on the 23rd June, 1888, decided that judgment should be entered for the plaintiff for possession of the land, and judgment was at once entered accordingly and the plaintiff put in possession by the sheriff under a writ of possession. This was before the Consolidated Rules came into force.

Held, that under the practice, and having regard to Rules 273, 274, 275, 341, and 379 of the Ontario Judicature Act, 1881, there was nothing to remove actions for the recovery of land out of the general rule and the entry of judgment, and subsequent proceedings were regular.

Sec. 34 of R.S.O., 1877, c. 51, was repealed by Rule 273 of the Ontario Judicature Act, 1881.

E. R. Cameron for the plaintiff.

W. R. Meredith, Q.C., and *R. M. Meredith* for the defendant

Common Pleas Division.

ROSE, J.]

HAMILTON *v.* BROATCH.

Malicious prosecution—Leave granted to put in original information and judgment of acquittal.

In an action for false arrest and malicious prosecution, arising out of false information laid by defendant, a certified copy of the inform

ation having been put in and objected to, leave was given to put in the original as also an exemplification of the judgment of acquittal, for it appearing that the merits were not with the defendant, technicalities should not be allowed to defeat justice.

Burdett and *S. O'Brien* for the plaintiff.

W. Kerr, Q.C., for the defendant.

GALT, C.J.]

ST. CATHARINES RAILWAY CO. *v.* MORRIS.

Railway—Loss of local custom by use of railway—Compensation—Speculative damages.

Where under the Railway Act, 51 Vict., c. 29 (O.) the owner of a mill who was also the owner of a lot adjoining the mill which was used as the principal means of communication between the mill and a public highway and across which lot a railway company had erected a trestle bridge, also sought compensation for the loss of local custom to and from the mill, not arising from the construction of the railway but from a subsequent use of it.

Held, that the damages were too remote and speculative to be allowed.

Aylesworth and *Ingersoll* for defendants.

Collier contra.

ROBERTSON, J.]

MCCONNELL *v.* MCCONNELL.

Domicile—Evidence of.

Held, upon the facts set out in the judgment in this case, that although a testator's domicile was in Ontario he had changed it to the United States, which was his domicile at the time of his death, and his will therefore must be construed according to the laws of Minnesota, U.S., as regards all his personal estate, and his real estate there, and according to the laws of Manitoba, as regards his lands there, and as to the Ontario lands they devolved on his executors.

Douglas, Q.C., for plaintiff.

Cassels, Q.C., for defendant.

GALT, C.J.]

HENDERSON *v.* STISTED.

Assessment and taxes—Exemptions—51 Vict., c. 29, s. 3 (O.)

By s. 3 of the Assessment Amendment Act, 51 Vict., c. 29 (O.), which came into force on August 21st, 1888, s. 7 of the Assessment Act, R.S.O., c. 193, was amended by adding to the exemptions "all horses, etc., owned and held by any owner or tenant of any farm, and when carrying on the general business of farming or grazing." The defendant township was instituted under the Municipal Institutions Act for Algoma, Muskoka, etc., R.SO.., c. 185, s. 20 of which provided for the making of an assessment roll, which said roll, by s. 28, when finally revised, was to be the roll of the municipality until a new roll was made, the Council by s. 29 to fix the time for making the assessment roll, at periods of not less than one year nor more than four years, and the year for the purposes of the Act was to commence on first of January thereof, and by s. 364 of the Municipal Act, R. S.O., c. 184, the rates or taxes were to be considered imposed on and from 1st January and to end with 31st of December, unless otherwise provided. By s. 30 the Council might each year, after the final revision of the roll, pass a by-law levying a rate on all the real and personal property. The assessment for the year 1888 was made in the months of March and April, and the roll was returned to the clerk of the municipality on or about 1st of May, and was finally revised by the Council sitting as a Court of Revision on 16th June. On 14th August a by-law was passed directing a rate to be levied to meet the current expenses for the year.

Held, under the circumstances the personal property mentioned was not exempt for the year 1888.

Urquhart for the plaintiff.

George Bell for the defendant.

FALCONBRIDGE, J.]

GRIFFIN *v.* PEMBROKE.

Copyright—Right of author to deposit copy, etc. —Right to proceed for infringement—Railway ticket—Subject of copyright.

S. 5 of the Consol. Stat. Can., c. 81, is merely directory, and so the neglect of the author of a work to deposit a copy thereof in the library of Parliament does not incapacitate him from proceeding for infringement of it.

A railway ticket is not a subject of copyright under said Act.

Bain, Q.C., for plaintiff.

Cattanach and *R. Vashon Rogers* for defendant.

PROUDFOOT, J.]

SAMS *v.* HUTCHINSON.

Winding-up Act—Necessity for liquidators to sue by order of court—Objection made too late—Mortgage received as collateral security—Production before judgment entered.

Action by plaintiffs to recover the price of an implement manufactured by them. A winding-up order had previously been obtained against plaintiffs, and a liquidator appointed. An objection was taken at the trial, after the evidence had been given, that the action should have been brought in the name of the liquidator and with the approval of the Court, under s. 31 of R.S.C., c. 129. The order authorizing the liquidator to sue either in his own name or that of the plaintiff was put in after the hearing.

Held, that the objection was too late and must be overruled.

Semble the proper course is to move in Chambers to dismiss the action for want of authority to sue; and *semble*, also, as the plaintiffs under the statute had power to sue, they could do so without the authority of the Court, if they chose to run the risk of costs.

The plaintiffs had obtained a mortgage from one of the defendants as collateral security for the debt, which they had assigned to a bank. The Court directed that judgment was to be entered for plaintiffs only on the production of the mortgage and a reconveyance or discharge thereof to the mortgagor.

ROBERTSON, J.]

WADDELL *v.* ONTARIO CANNING CO.

Company—Illegal acts done by majority of shareholders—Right of minority to investigation—By-law ratifying illegal acts—Invalidity of—Injunction.

In a company consisting of seven shareholders, the plaintiffs, four of the shareholders, holding 25 per cent. of the stock, claimed that there had been mismanagement of the company's funds in the payment of large sums to the president and secretary for salaries or services without any legal authority therefor, and in failure to declare any dividends, though the company had made large profits, and that no satisfactory investigation or statement of the company's affairs could be obtained though frequently applied for, and it was impossible to ascertain the company's true financial standing. Under these circumstances an investigation of the company's affairs was directed.

At a meeting of four of the directors, constituting the majority, held after proceedings taken by the minority to disallow the illegal payments made to the president and secretary, and without proper notice to the minority of such meeting or its object, a resolution was passed ratifying the payments made to the secretary, and at an adjourned meeting, of which also the minority received no notice, by-laws were passed ratifying the payments made both to the president and secretary.

Held, that the resolution and by-laws were invalid and could not be ratified by the shareholders; and an injunction was granted restraining the company from acting thereunder, or from holding a meeting of shareholders to ratify and confirm same.

Bain, Q.C., and *F. R. Waddell* for plaintiff.
E. Martin, Q.C., and *Duff* for defendants.

DIV'L COURT.]

REGINA *v.* RICHARDSON.

Recognizance—Absence of affidavit of justification—Sufficiency—R.S.C., c. 178, s. 90.

By s. 90 of R.S.C., c. 178, and the rule of court thereunder, no motion to quash any conviction brought before any court by *certiorari* shall be entertained unless the defendant is shown to have entered into a recognizance with two or more sufficient sureties.

Held, that the sufficiency of the suretyship is not shown by the mere production of the recognizance, but there must be evidence on which the court can say there were sufficient sureties.

When, therefore, there was no affidavit of justification to the recognizance it was held not to comply with the statute.

V. Mackenzie, Q.C., for motion.

REGINA *v.* FLOREY.

Closing shops—By-law for—Discrimination—Illegality—Distress—51 Vict., c. 33 (O.)—37 Vict., c. 33, s. 2, ss. 14, R.S.O., c. 184, s. 421.

A by-law passed by the town of A. under s. 2, ss. 2 of the Ontario Shop Regulation Act, 51 Vict., c. 33 (O.), provides (1) That all shops, etc., where goods were exposed or offered for sale by retail in the town should be closed at seven p.m. on each day of the week, excepting

Saturday, from 15th of January to 15th of September, etc. Sec. 3 provided that it should not be deemed an infraction of the by-law for any shop-keeper or dealer to supply any article after seven p.m. to mariners, owners, or others of steamboats, or vessels calling or staying at the port of A.

Held, that the by-law was bad, for that s. 3 was illegal in discriminating between different classes of buyers and different classes of tradesmen, and was in controvention of ss. 9 of said section 2.

A conviction of defendant under the by-law was therefore quashed.

Held, also, that a provision for distress in default of payment of the fine and costs imposed did not constitute a part of the penalty or punishment imposed by the by-law, but merely a means of collecting the penalty, as authorized by s. 2, ss. 14 of 37 Vict., c. 33 and s. 421 of the Municipal Act, R.S.O., c. 184.

Aylesworth for the applicant.

Langton contra.

REGINA *v.* COPP.

Municipal corporation—Internal walls of buildings—Right to prescribe thickness of—Party walls—What constitutes.

The 10th sub-sec. of sec. 496 of the Municipal Act R.S.O., c. 184, as regards walls of existing buildings, only applies to external walls thereof and not to internal walls, and therefore municipal councils have no power to prescribe of what materials or of what thickness such internal walls should be. Sub-sec. 18, relating to party walls, does not apply to internal walls separating buildings belonging to the same owner, for to constitute party walls they should separate the adjoining properties of different owners. Where, therefore, a by-law was passed by the corporation of the City of Hamilton, prescribing the material and thickness of the internal walls of every building, which therefore included existing buildings, and the defendant was convicted thereunder, by reason of, in the course of dividing a building owned by him into three separate shops, making the dividing walls of less thickness than that prescribed by the by-law,

Held, that the by-law was bad, and a conviction made thereunder was quashed.

Aylesworth for the applicant.

Mackelcan, Q.C., contra.

REGINA *v.* GOOD.

Indian lands—Removing hay from—What constitutes "hay"—Right to include costs of commitment and conveying to jail in conviction—Indian Act, R.S.C., c. 43, s. 26.

The defendant was convicted for removing hay from Indian lands, contrary to s. 26 of the Indian Act, R.S.C., c. 43.

Held, that the word "hay" used in the statute does not necessarily mean hay from natural grass only, but what is commonly known as hay, namely, either from natural grass, or grass sown and cultivated.

Held, also, that under this Act and the legislation incorporated therewith there is no power to include in the conviction the costs of commitment and conveying to gaol.

Mackenzie, Q.C., supported motion.

Aylesworth contra.

MADDEN *v.* HAMILTON FORGING CO.

Workman's Compensation for Injuries Act—Injury sustained by workman through improper instructions by superintendent—Liability of master.

The defendants, an iron works company, used in their business a pair of shears for cutting up boiler plate and scrap iron prior to its being placed in the furnace to be melted. It was the duty of the plaintiff and another workman to put the iron into the shears. While a large iron gate was, by the superintendent's orders, being put into the shears to be cut up, by reason of the improper instructions given by the superintendent the plaintiff in the course of his duty was injured. The plaintiff, though apprehensive of danger, was not aware of the nature and extent of the risk, and obeyed through fear of dismissal. In an action against defendants under the Workman's Compensation for Injuries Act for the damage sustained by plaintiff,

Held, that defendants were liable.

Carscallen for defendant.

Bain, Q.C., and *Waddell* for defendant.

GOOSE *v.* GRAND TRUNK RAILWAY CO.

New trial—Omission to swear juror.

The court will not grant a new trial because one of the jurors has not been sworn when no injustice has been done thereby.

Douglas, Q.C., for plaintiff.

Osler, Q.C., for defendant.

MARKS *v.* CORPORATION OF WINDSOR.

Jury—Dispensing with after evidence taken.

The judge at the trial of an action has the power to dispense with the jury after all the evidence has been taken, but the power should be sparingly exercised.

Aytoun Findlay for plaintiff.

W. R. Meredith, Q.C., for defendant.

KEARNS *v.* TENNANT.

Partnership — Continuing deceased partner's share in business—Evidence of—Debt due deceased partner's estate.

K., a partner in a firm, by his will made in 1884, appointed plaintiff executor and trustee, and after a general bequest to plaintiff to hold all his real and personal estate in trust, directed him within six months after his death to ascertain the proper amount due his estate for his share in the firm's business, and when ascertained to allow the same to remain in the business with interest at six per cent., and to pay such interest to his wife during her life; but if he deemed it advisable to do so to withdraw said share from the business in the proportion of twenty per cent. annua y from the time said amount was ascertained, and to invest said sums so withdrawn and to pay the interest thereon to his wife for life. The evidence showed that after the share was ascertained it was not continued in the business for the purpose mentioned in the will, but was treated and made a debt to K.'s estate.

Held, that under the circumstances, the plaintiff, as executor of K.'s estate, was not as to K.'s share, in the position of a partner in the firm.

The firm in question was from 1860 to 1862 composed of K. and R., when T. was taken into the firm, the firm thus constituted to continue so long as deemed advisable for the mutual benefit. In 1871 K. and R. insured their joint lives for $10,000, to be paid to the survivor. In 1876 R. assigned his interest to K., and in 1884 K. assigned same as collateral security to a person who had endorsed for the firm. On K.'s death the insurance company paid the insurance money to the holder of the policy, who handed the amount to T., who retired the notes therewith.

Held, that the plaintiff was entitled to recover the amount as a debt due to K.'s estate.

Osler, Q.C., and *MacCracken* Q.C., for plaintiff.

Snow and *A. Cassels* for defendant.

Div'l Ct.]

JONES *v.* GRACE.

Justice of the peace—Backing warrant of commitment in adjoining county — Illegality—Joint trespass—Damages—Constable executing—Liability of—24 Geo. II., c. 24—Notice of action—Interpretation Act.

The plaintiff, who resided in the County of H., was convicted before defendant G., a police magistrate for the County of B., for giving intoxicating liquor to an Indian, and fined, with committal to the county goal of B. on non-payment of the fine. The fine not having been paid, G. issued a warrant of commitment directed to all the peace officers of B. to arrest plaintiff, and prepared a form of endorsement to be signed by a Justice of the Peace of H. County, authorizing the defendant N., a constable, to arrest the plaintiff in H. G. handed the warrant to N., telling him plaintiff lived in H. and he would have to get the warrant endorsed. N. took it to R., a Justice of the Peace for H., who signed the endorsement, and plaintiff was arrested by N. and taken first before G. in B. to see if he would accept a note in payment, and then to the county jail of B. The plaintiff was afterwards discharged on *habeas corpus*, but the conviction was not quashed.

Held (Galt, J., dissenting), that the action was maintainable against the defendants G. and R.; that there was no power enabling R. to back the warrant, and that he was guilty of trespass in so doing, and that G. was liable as a joint trespasser, for by his interference he was responsible not only for the arrest but for the subsequent detention in the jail at B.

At the trial the jury found that plaintiff had sustained no damage as against R., and they assessed the damages solely against G. Judgment was thereupon entered as against G., and the action dismissed as to R.

Held, that the finding of the jury as to the damages was in law permissible, but, if R. should have been held liable, as plaintiff at most could only have a new trial or elect to retain his judgment as against G. alone, the Court would not interfere with the finding.

Quære. Whether the constable N. was protected under 24 Geo. II., c. 24?

The endorsement on the notice of action herein was that it was given by V. M. of Queen Street in the City of Brantford, in the County of Brant, solicitor for the within named James Jones. Within was the notice, namely: "I do hereby, as solicitor for and on behalf of James Jones, of the village of Jarvis, in the County of Haldimand, farmer," etc.

Held, that the notice, taken in connection with the Interpretation Act, 31 Vict., c. 1, s, 29, was sufficient, etc. *Morgan* v. *Palmer*, 13 C.P. 528 not followed, as decided prior to said Act; but *quære*, whether any notice of action was necessary.

Form of order as to costs of N. given.

McCarthy, Q.C., for plaintiff.

Delamere and *Brewster* (of Brantford) for the defendant G.

Aylesworth for defendant B.

S. A. Jones for defendant N.

Div'l Ct.]

BROWN *v.* MCCRAE.

Damages—Fire caused by defendant's negligence —Right to set off amount received from Insurance Co.

In an action by plaintiff to recover damages for the destruction of his dwelling house and a quantity of chattel property, caused by sparks emitted from the defendant's steam tug through defendant's negligence,

Held, that the defendant was not entitled to deduct from the amount of damages found to have been sustained by the plaintiff an amount paid to the plaintiff by an insurance company under an insurance on the property.

Meredith, Q.C., for plaintiff.

Osler, Q.C., and *M. Wilson* for defendant.

Div'l Ct.]

REGINA *v.* FIFE.

Justice of the peace—Malicious Injuries to Property Act, R.S.C. 168—Warrant of commitment—Omission of "unlawfully"—Effect of —Omission of amount of damage.

Under s. 58 of the Malicious Injuries to Property Act, R.S.C., c. 168, the offence must be unlawfully and maliciously committed, and the damage must exceed $20. In this case the warrant of commitment charged the offence as having been wilfully and maliciously committed, omitting the word "unlawfully."

Held, that this was fatal to the commitment, and it was directed to be quashed.

Held, also, that the commitment should have alleged that the damage exceeded $20.

W. M. Douglas for defendant.

Moore contra.

Div'l Ct.]

SINDEN *v.* BROWN.

Justice of the peace—Action against—Summary Convictions Act—Imprisonment for non-payment of fine after payment of costs.

A conviction under the Summary Convictions Act required the defendant to pay fine and costs, in default of payment distress, and in default of sufficient distress, imprisonment. The plaintiff paid the costs, and was subsequently arrested and imprisoned for non-payment of the fine; the conviction and commitment remained in force unquashed.

Held, that the conviction could be enforced by imprisonment for non-payment of the fine, notwithstanding the payment of the costs; and therefore, with the conviction remaining in force, the action was not maintainable.

The law laid down in *Frigerson* v. *Board of Police, of Cobourg*, 6 O.S. 405, not followed in this respect.

Mackenzie, Q.C., for plaintiff.

E. Martin, Q.C., contra.

Div'l Ct.]

BALZER *v.* GOSFIELD.

Municipal corporation—Assumption of township road by county—Liability of county—Remedy over against township—Municipal Act, s. 531, s.s. 1, 4, s. 533, 566. s.s. 5.

Action by plaintiff for damages for the loss of his horse, which was killed by falling into a ditch dug by the township, in a road therein, under a drainage by-law. The Township Council had passed a by-law for opening and establishing this road and shortly after the County Council had passed a by-law assuming the road as a county road of the said county, for the purpose of expending thereon the county appropriation, and for such purpose only. The money of the county was expended from year to year on the said road. The county by-law was proposed and seconded by the township reeve, and its validity, although never assented to by by-law, was never disputed by the township.

Held, that by their by-law the county had assumed the road as a county road, and there was no power in the statute authorizing them to limit the assumption in the manner proposed, and that, under the circumstances, the county could not set up the absence of a township by-law assenting to the assumption.

Secs. 533 and 566, s.s. 5 of R.S.O., c. 184, relied on by the county, were held not applicable to this case.

Held, also, that the county, under s. 531, s.s. 4, were bound to keep the road in repair, and were liable to plaintiff, but under s.s. 4 they were entitled to judgment over against the township.

Lash, Q.C., for plaintiff.

Aylesworth for defendant county of Essex.

Meredith, Q.C., for defendant township of Gosfield South.

Div'l Ct.]

REGINA *v.* DOWLING.

Justice of the peace—Fraud on cheese factory—51 Vic., c. 32 (O.)—Offence outside of county—Jurisdiction of police magistrate—Certiorari—Ultra vires.

The defendant was tried at Belleville before the police magistrate of the County of Hastings, and convicted for, amongst other things, supplying milk from which the cream or strippings had been taken or kept back. The factory was in Hastings, but the defendant resided, and the milk was supplied, in the counties of Lennox and Addington.

Held, that the police magistrate of Hastings had no jurisdiction to try the offence, and the conviction must be quashed.

Held, also, that the *certiorari* had not been taken away in such cases; but even if it had, the Court would not be justified in refusing to examine the evidence to see if the magistrate had jurisdiction.

Shepley for defendant.

Burdett and *C. J. Holman* contra.

Div'l Ct.]

OWEN SOUND STEAMSHIP CO. *v.* ONTARIO AND QUEBEC RAILWAY CO.

Railway company—Agreement to pay minimum sum out of joint traffic rates—Ultra vires—Legislation legalising.

By an agreement entered into between the plaintiffs and the T. G. & B. R'y Co., it was agreed that there should be certain joint rates chargeable to passengers and freight by the steamship company and the railway company, to be divided in certain proportions, and, if it should be found that the proportion payable to the steamship company did not at the end of the season amount to the sum therein stipulated, then that the deficiency should be made good by a rebate from the share of the railway company; and on the other hand if the steamship company received more than the sum mentioned in the agreement the railway company were entitled to a share of the surplus. Subsequently an agreement was entered into whereby the T. G. & B. R'y Co. leased their lines to the O. & Q. R'y Co., the latter agreeing to assume the contract with the plaintiff. This agreement was ratified by Act of Parliament. The O. & Q. R'y Co. made a lease of their lines to the C.P.R. Co., which was confirmed by Act of Parliament, and by which Act the C.P.R. Co. were to assume all contracts of the T. G. & B. R'y Co., including the one with the plaintiff.

Held, that even if the agreement between the plaintiffs and the T. G. & B. R'y Co. were *ultra vires* the latter company, it was made valid by the subsequent legislation; but apart therefrom it was in no sense objectionable.

D. E. Thomson and *G. Bell* for plaintiffs.

McCarthy, Q.C., and *G. T. Blackstock* contra.

REGINA *v.* AUSTIN.

Taverns and shops—Liquor License Act—Club incorporated under Benevolent Societies Act—Sale of liquors by.

Held, that the meaning of sec. 53, sub-sec. 3, of the Liquor License Act is that where in a club or society incorporated under the Benevolent Societies Act, liquor is sold or supplied to members, but such sale or supplying is not the special or main object of the club, etc., but is merely an incident resulting from its principal object, as here a gun club, there is no violation of the License Act, but it is otherwise, if the sale or supplying the liquor is the main object of the incorporation.

The question, however, is for the decision of the magistrate on the evidence, and there being evidence here to support the finding of the magistrate that the sale of liquor was the special or main object of the club, with the intent to evade the Liquor License Act, the court re-

ferred to interfere with his finding, and dismissed a motion to quash a conviction made by him against defendant.

Bigelow for the defendant.

J. J. Maclaren contra.

Div'l Ct.]

ANDERSON *v.* C.P.R.

Railways—Condition limiting liability for loss of baggage—Letters written between the company's officers—Admissibility of.

In an action by the plaintiff, a passenger by defendants' railway, for loss of her baggage, and in which the defence was, the defendants' liability was limited, by a condition on the ticket, to $100, certain letters were admitted in evidence, one written by the defendants' general baggage agent to the passenger agent asking whether plaintiff's attention had been called to the condition on the ticket, and why it had not been signed by her; and the other the reply thereto, stating that the Company's rules did not require unlimited first-class tickets signed, and that this ticket had been sold at full tariff rate.

Held, that the letters were properly admitted, but they were of no consequence as the ticket on its face showed that it was not purchased subject to the condition.

Held, also, that the six months limitation clause, R.S.C., c. 109, sec. 27, does not apply to an action of this character arising out of contract, but to actions for damage occasioned by the company in the execution of the powers given or assumed by them to be given for enabling them to maintain their railway.

Wallace Nesbitt for the plaintiff.

G. T. Blackstock for the defendant.

Chancery Division.

ROBERTSON, J.] [Sept. 5.

O'SULLIVAN *v.* PHELAN.

Will—Devise—Condition in restraint of sale—Restricted to name and family of testator.

A testator by his will devised certain real estate to two of his nephews, subject to the following condition: "But neither of my said nephews is to be at liberty to sell his half of the said property to any one except to persons of the name of O'S. in my own family. This condition is to attach to every purchaser of the said property."

Held, that as all power of alienation was not taken away the condition was good in respect to a sale, but that there was nothing in it to prevent disposing of the property in any other way, as by gift, devise, or otherwise, and that there was power to mortgage.

Re Macleary, L.R. 20 Eq. (p. 188) followed.

Re Watson v. *Woods*, 14 O.R. 48, referred to.

Anglin for plaintiff.

Moss, Q.C., for infant defendants.

No one appeared for adult defendants.

Full Court.] [Sept. 12.

CUMBERLAND *v.* KEARNS

Covenant against incumbrances and for quiet enjoyment—Local improvement rates.

Action in covenants in a deed of land whereby the defendants covenanted that he had done no act . . . whereby or by means whereof the lands . . . were, or should, or might be in anywise impeached, charged, or affected, or encumbered in title, estate, or otherwise howsoever, and that the grantee should enjoy them free from all incumbrances.

It appeared that a scheme of local improvement which resulted in the imposition of a fixed rate for 10 years to defray the expense of the improvement was undertaken at the instance and upon the petition of the defendants and other property holders interested under R.S.O. 1889, c. 184, s. 612, ss. 9.

The by-law creating the charge was passed before the conveyance to the plaintiff, although the precise sum to be paid by each parcel was not ascertained by apportionment till after the conveyance.

Held, affirming the decision of ROBERTSON, J., that the plaintiff was entitled to recover for breach of the covenants, and to be indemnified in full.

Per BOYD, C.—Different would be the conclusion if the taxes had been imposed by municipal authority without the intervention of the defendants.

Haverson for the defendants.

Ferguson for the plaintiff.

Practice.

Q. B. Div'l Ct.] [June 22.

FORD *v.* LANDED BANKING AND LOAN CO.

Administrator ad litem—Rule 311.

The plaintiff claimed from the defendants a

sum of money, part of which had been deposited by E. P. and part by herself, but all in the name of E.B., who was a non-existent person. E. P. died intestate before this action was brought, and no letters of administration to his estate having issued, the plaintiff applied under Rule 311 for the appointment of an administrator *ad litem*.

The Court refused to make an appointment.

Meir v. *Wilson*, 13 P.R. 33, approved and followed.

Carscallen for plaintiff.

Mackelcan, Q.C., for defendant.

C. P. Div'l Court.] [Sept. 7.

In re McGREGOR *v.* NORTON.

Prohibition—Division Court—Money paid into court by defendant—Plaintiff's intention to proceed—Failure to notify in writing—R.S. O., c. 51. ss. 125, 126, 127—Motion to inferior court to set aside judgment.

The defendant in a Division Court suit paid a sum of money into court as a full satisfaction of the plaintiff's demand, under R.S.O., c. 51, s. 125, and the plaintiff was notified thereof.

The plaintiff notified the clerk of the court, but not in writing, that he intended to proceed for the remainder of his claim.

Sec. 126 of R.S.O., c. 51, provides that when payment is made into court under sec. 125 the plaintiff is to be notified, "and the sum so paid shall be paid to the plaintiff, and all proceedings in the action stayed, unless within three days after the receipt of the notice the plaintiff signifies in writing to the clerk his intention to proceed . . in which case the action shall proceed as if brought originally for such remainder only."

Held, that the words of the statute are imperative; and in the absence of the written notice all proceedings were stayed. A trial which took place afterwards was therefore a nullity; and prohibition was granted restraining proceedings upon the judgment recovered by the plaintiff at such trial.

Held, also, that an application by the defendant to the inferior court to set aside the judgment so recovered was not a bar to the motion for prohibition.

Semble, it was a convenient practice to move in the inferior court.

Decision of FALCONBRIDGE, J., 13 P.R. 28, reversed.

Kappele for plaintiff.

Bicknell for defendant.

Appointments to Office.

LOCAL MASTER.

Prescott and Russell.

Louis A. Oliver, of L'Original, Judge of the C.C. of said counties to be a Local Master of the Supreme Court of Judicature for Ontario, in and for the said counties, *vice* F. W. Thistlethwaite, resigned.

DIVISION COURT CLERKS.

Waterloo.

A. Boomer, of Linwood, to be Clerk of the Sixth Division Court of the County of Waterloo, *vice* Robert Morrison, resigned.

Bruce.

Angus McKay, of Ripley, to be Clerk of the Ninth Division Court of the County of Bruce, *vice* J. Humberstone, resigned.

Miscellaneous.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for September 7th and 14th contain The Papacy: a Revelation and a Prophecy, Mr. Wallace on Darwinism, by Geo. J. Romanes, F.R.S., and The Civil List and Grants to the Royal Family, *Contemporary;* The French in Germany, *Nineteenth Century;* Giordana Bruno, *Fortnightly;* Some Few Thackerayana, *National;* In Macedonia, William Cowper, Hippolytus Veiled, and Orlando Bridgman Hyman, *Macmillan's;* Seen and Lost, *Longman's;* In praise of the Carnots, *Murray's;* The Papacy, *Spectator;* with instalments of "Sir Charles Danvers," "A Modern Novelist," and "Patience," and poetry. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

The Canada Law Journal.

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THE Law School was formally opened on the 7th inst. Hon. Edward Blake, the Treasurer of the Law Society, presided, and addressed the assembled students, and the learned Principal delivered an address, in the course of which he sketched the history of law schools and their relations to the legal profession in England and the United States, and discussed the curriculum now in force. Several other distinguished legal gentlemen joined in congratulating the Law Society and the students on the successful establishment of the School. During the present session the first and second years will take the same lectures, but will be examined on different papers at the end of the term. Seven scholarships are to be given to each of these years on this examination. There are now about one hundred and twenty students in attendance.

LEGAL STATISTICS FOR 1888.

The Annual Report of Mr. Winchester, the Inspector of Public Offices, serves as a sort of barometer of the state of business in the profession; and it may therefore be useful as well as interesting to take a glance at some of the statistics he has gathered and which he presents in his report to the Government for 1888, which we have now before us.

We learn from the schedules to this report that during 1888, 4,954 writs of summons issued from the Q.B. and C.P. Divisions of the High Court, and 2,552 from the Chancery Division, or an aggregate of 7,506 writs. The amounts indorsed on these writs in the Q.B. and C.P. Divisions aggregated $7,019,635.47; and the aggregate in the Chancery Division was $3,888,974.12, or very nearly eleven million dollars altogether. Notwithstanding all efforts to decentralize business, it seems nevertheless to cling steadily to Toronto, where 2,428 of the writs issued. London, as usual, comes next to Toronto with 541, and Cornwall next with 299. There is one feature about this return we do not understand. The writs are supposed to issue alternately from the three Divisions, and yet in Ottawa the total number of writs in the Q.B. and C.P. Divisions together was 103, while the writs in the Chancery Division numbered 106; it would seem there that the clerk who issues the writs has been proceeding on the wrong principle of treating the Q.B. and C.P. Divisions as together constituting one Division.

But though 7,506 actions appear to have been commenced only 3,024 judgments appear to have been entered, and of these 2,427 were entered without trial, *i.e.*, the judgments were obtained by default or on motions for judgment, and only 597 after trial. In the County Courts 4,347 writs appear to have issued, of which nearly one-fourth were issued in Toronto. The total amount claimed was $904,424.61. The total number of judgments entered in the County Courts was 2,294, of these 2,066 were entered without trial, and the remaining 228 after trial. By the former $476,712.28 damages and $30,362.43 costs were recovered, and by the latter $28,800.08 damages and $21,779.64 costs. We are unable to present similar statements of the amounts recovered in the High Court, as no returns are made to the Inspector from the Toronto offices.

During the year 1888 15,486 chattel mortgages were registered securing $7,255,419.51.

On turning to the record of business done in the Surrogate Offices we find that the total amount of personal property devolving during the year 1888 was no less a sum than $12,180,202.22, but we were somewhat surprised to find that the value of the realty devolving during the same period was only $3,015,053.48. The total number of probates granted was 2,236, and of letters of administration 1,272. Dividing the aggregate values of the estates devolved between the numbers of estates to which probate or administration were granted would give an average value to each of $4,331.

We cannot readily make a comparison between the statistics of 1888 and the year 1887, because in that year the totals were not added up in the schedule. Comparing them with 1886 the business appears to have steadily increased. The total number of writs of summons issued in the latter year from the High Court being 6,090, the amount for which they were indorsed being $8,787,407. against 7,506 indorsed for nearly $11,000,000. Further comparisons might be instituted, but it may suffice to say that all along the line the volume of business will be found to show a steady increase.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We continue the Law Reports for August comprised in 23 Q.B.D., pp. 133-263; 14 P.D., pp. 85-130; 41 Chy.D., pp. 437-577, and 14 App. Case, pp. 105-336.

TRUSTEE—DEPRECIATED SECURITIES—APPLICATION BY TRUSTEE FOR ADVICE—COSTS.

In re Medland Eland v. *Medland*, 41 Chy.D. 476, was a summary application to North, J., by trustees for advice as to their duty regarding certain mortgage securities belonging to the trust estate, which had fallen in value so that the mortgage debt had come to exceed two-thirds of the value of the mortgaged property. Some only of the beneficiaries were parties to the application. North, J., was of opinion that it was not the absolute duty of the trustees at once to call in the mortgage debt, but that they have a discretion which they must exer-

cise as practical men having regard to the circumstances of the case, such as the position and solvency of the mortgagor, and an inquiry was directed as to what should be done. North, J., was of opinion that he had no jurisdiction to award costs out of the trust estate, as all the beneficiaries were not parties to the application. On appeal, however, the Court of Appeal (Lord Esher, M.R., Cotton, and Fry, L.JJ.) held that the learned judge had jurisdiction to order payment of costs out of the estate and might direct any of the beneficiaries not before the Court to be notified as he should see fit, and the order of North, J., was therefore varied by reserving the costs until after the inquiry directed had been concluded.

WILL—CONSTRUCTION —" SURVIVING "—GIFT TO TENANTS FOR LIFE AND THEIR CHILDREN—GIFT OVER TO SURVIVING TENANTS FOR LIFE AND THEIR CHILDREN.

In re Bowman, Whitehead v. *Boulton*, 41 Chy.D., 525, Kay,J., was called upon to place a construction on the will of testatrix which bequeathed £8,000 to a trustee upon trust to invest and pay the income equally amongst the testatrix's four nieces during their respective lives; and after the decease of any of them to pay the principal of her share to her children as she should appoint, and in default of appointment, to them equally; the shares of sons to be vested at 21 and of daughters at 21 or marriage, with benefit of survivorship among them as to the original and accruing shares of any who should die before attaining a vested interest, and in case of any of her nieces dying without having had any children who should have attained a vested interest, she gave the share of such niece and the interest thereof upon trust, " to pay and dispose thereof to or among her (the niece's) surviving sisters and their respective children in the same manner as I have hereinbefore directed respecting their original shares," and she gave her residuary personal estate to her nephew. The four nieces survived the testatrix. One of them died, leaving children, and two others subsequently died without issue. The question was, whether the children of the niece who first died were entitled to participate in the shares of the nieces who subsequently died? Kay, J., answered this in the affirmative, holding that the scheme of the will indicated that it was the intention of the will to make a disposition *per stirpes*.

WASTE, PERMISSIVE—TENANT FOR LIFE AND REMAINDERMAN—RIGHTS AND LIABILITIES OF.

It is somewhat curious to find at this late date that *In re Cartwright, Avis* v. *Newman*, 41 Chy.D. 532, an attempt should be made for the first time to make the estate of a legal tenant for life, upon whom no duty to repair was imposed, liable for permissive waste at the suit of the remainderman. Kay, J., held that the claim being entirely without precedent must be disallowed.

PRACTICE—MORTGAGOR AND MORTGAGEE—COSTS—INTEREST ON COSTS WHEN ALLOWED.

In *Eardley* v. *Knight*, 41 Chy.D. 537, a point of practice was determined as regards mortgage actions, by Kay, J. An action brought by a mortgagor

against the mortgagee to set aside the mortgage, was dismissed, and judgment given in favour of defendant for foreclosure with costs, and upon appeal the judgment was affirmed and the defendant was given leave to add the costs of appeal to his security. In bringing in the mortgagee's accounts, the question arose as to whether the defendant was entitled to interest on the costs ordered to be paid to him, and from what date. Kay, J., determined that he was only entitled to interest on the costs which had been ordered to be added to his security, viz., the costs of the appeal, and on those costs only from the date of the certificate of taxation, and not from the date of the judgment.

PRACTICE—SERVICE OUT OF JURISDICTION—INJUNCTION—SEQUESTRATION—ORD. XI., R. 1, S.S. F. 1. 2. (ONT. RULE, 271).

In re Burland, Burland v. *Broxburn Oil Co.*, 41 Chy.D. 542, which was an action to restrain the infringement of the plaintiffs' registered trade mark against the defendants, being a company having their registered office at Glasgow with branches at London, Manchester, and Hull, Chitty, J., gave leave to serve the writ out of the jurisdiction, because an injunction could be enforced by sequestration of the defendant company's property in England.

WILL—CONSTRUCTION—TRUST FOR BENEFIT OF SPECIFIED ANIMALS.

In re Dean, Cooper-Dean v. *Stevens*, 41 Chy.D. 552, is an instance of the eccentricities sometimes indulged in by testators. In this case the testator had bequeathed certain dogs and horses to trustees, and directed that an annual sum of £750 which he charged on his real estate should be applied for their maintenance for the period of fifty years if any of them should so long live, and any part of the £750 remaining unapplied was to be dealt with by the trustees at their sole discretion. It was contended that a trust for the maintenance of animals was invalid because there was no one to enforce it, and that the trustees were entitled to the £750 per annum for their own benefit; but North, J., held that the trust was valid and that the trustees were not entitled beneficially to the fund or even to the surplus not required for the maintenance of the animals, but whether the devisee or heir was entitled to the surplus he declined to determine in the absence of the latter.

PRACTICE—AMENDMENT AT TRIAL.

Edevain v. *Cohen*, 41 Chy.D. 563, was an action to recover furniture wrongfully removed, and for damages. Judgment had been obtained by the plaintiffs for the wrong now complained of, against other persons in another action. There was some evidence of acts done since the writ in the former action which might raise a fresh cause of action. After the conclusion of the evidence of the plaintiff and one defendant, the defendants applied to amend by pleading that the cause of action had merged in the judgment; but North, J., refused to permit the amendment, because if he did the plaintiff should be allowed to new assign, and adduce new evidence.

POWER—MARRIED WOMAN—DIRECTION TO EXECUTORS TO PAY DEBTS—APPOINTMENT TO EXECUTORS—CHARGE OF DEBTS ON PROPERTY APPOINTED.

In re DeBurgh Lawson, DeBurgh Lawson v. *DeBurgh Lawson*, 41 Chy.D. 568, a married woman who died in 1880, having a power of appointment in a colliery property, by her will directed her executrixes to pay her debts, and by virtue of the power appointed the colliery property to her executrixes upon certain trusts for the benefit of her children equally for life, and after the death of the survivor for the benefit of her grand-children equally. The testatrix was indebted at the time of her death, and the question arose whether these debts were charged on the colliery property. Stirling, J., on the authority of *Tanqueray-Willaume and London*, 20 Chy.D. 465, held that they were so charged.

MORTGAGEE—SALE—INCORRECT PARTICULARS—MISTAKE—COMPENSATION—PUISNE INCUMBRANCER.

The only remaining case to be noted in the Chancery Division is *Tomlin* v. *Luce*, 41 Chy.D. 573, in which Kekewich, J., appears to us to have arrived at a not very equitable conclusion. Mortgagees, acting under a power of sale, offered the mortgaged property for sale; by a mistake on their part in the particulars the roads on the property were stated to be kerbed. The vendors declined to complete without compensation, and the sale was completed, compensation being allowed, which it was admitted was reasonable. The present action was brought by second mortgagees for an account against the first mortgagees, and it was held that in the taking of the account the latter were chargeable with the sum allowed as compensation. Compensation for misdescription is allowed to a purchaser, as we understand it, on the principle that by reason of the misdescription the purchaser has been induced to give a larger price than he would have done had there been no misdescription; and the compensation is fixed at such sum as will fairly reduce the price to the figure that would have been given had there been no misdescription. If this is a correct view, we fail to see that there is any equity in giving a second mortgagee the benefit of that part of the price, which the mortgagee has been required to refund, by reason of the misdescription of the property.

We Proceed now to the Appeal Cases for August:—

SHIP—CHARTER-PARTY—MARGINAL NOTE—GUARANTEE AS TO SHIP'S CAPACITY—REPRESENTATION AS TO CARGO.

Mackill v. *Wright*, 14 Appeal Case, 106, is the first calling for attention. In this case the question was, whether or not a charter-party guaranteeing the capacity of the vessel, could be qualified in its construction by a marginal note, made by consent of the parties, as to the size of the machinery intended to be carried as part of the cargo. By the charter-party in question, the vessel was to proceed to Glasgow and load all such goods, etc., as the charterers should tender, not exceeding what she could reasonably carry. It was provided that the freight should be a lump sum of £2,200, and the owners guaranteed that the vessel should carry not less than 2,000 tons dead weight, and should the vessel not carry the guaranteed dead weight there was to be a proportionate deduction from the freight. The cargo intended

to be carried was a general cargo, consisting in part of machinery, and a note was, by consent of the parties, made on the margin of the charter-party, specifying the "largest pieces" of machinery intended to be included in the cargo with their number, weight, and measurement. The charterers tendered a cargo not exceeding in the aggregate 2,000 tons dead weight, but the large pieces of machinery exceeded the number specified in the margin so that the whole cargo could not be carried. The vessel sailed with only 1,691 tons. The plaintiffs (the charterers) claimed an abatement of freight. It was admitted that the vessel was of the carrying capacity guaranteed, and it was admitted that 2,000 tons dead weight of the cargo tendered could not be carried on the vessel unless the coal which formed part of the cargo had been packed with the machinery, which was not done. The House of Lords was of opinion that the marginal note amounted to a representation on the part of the charterers, and the fact of the vessel having carried less than the guaranteed weight because the charterers tendered pieces of machinery in excess of their representation, did not entitle the charterers to any reduction of freight, and the decision of the Court of Session on this point was reversed. But their Lordships affirmed the Court of Session in holding that the stowage of the coal among the machinery without the consent of the shippers would not have been proper, and that it was the duty of the appellants to obtain the consent of the shippers.

EXPROPRIATION OF LAND FOR PUBLIC PURPOSE—COMPENSATION FOR "INJURIOUSLY AFFECTING" OTHER LANDS.

The case of *Essex* v. *Local Board of Acton*, 14 App.Cas. 153, which we noted ante vol. 22, p. 338, as *Queen* v. *Essex*, 17 Q.B.D. 447, when before the Court of Appeal, has at last reached the end of its tether in the House of Lords, and their Lordships have reversed the judgment of the Court of Appeal and restored that of Mathew and Day, JJ. The case involves two very important principles as regards the right to recover damages for the expropriation of lands for public purposes. In the first place their Lordships hold that the fact that a parcel of land is severed by the intersection of a railway does not destroy the unity of the parcel for the purpose of the owner claiming compensation in respect of it. Thus in the present case the lands claimed to be "injuriously affected" were separated from the lands expropriated, in part by other lands of the plaintiff, and in part by a railway; nevertheless the plaintiff was held entitled to damages for the lands injuriously affected; and in the next place, in estimating the damages, their Lordships held that the plaintiff was entitled, not only the damages accruing from the construction of the public works for which the land was expropriated, but also the injury which would result from the carrying on the works when constructed. The works in the present case were sewage works, and the compensation was allowed on the basis of the deterioration of value likely to result to the surrounding property from the existence of such works in the neighbourhood, even though no nuisance might be caused. There is one passage in the judgment of Halsbury, L.C., which is worth extracting. He says: "The good sense of mankind recognizes the fact that occasional negligence is one of the

ordinary incidents of human life, and the common law, which embodies the common sense of the nation, proceeds upon common sense assumptions. I do not think it is any answer to tell people who complain of the establishment of sewage works in their neighbourhood that if, and when, the sewage works become a nuisance, in the real and proper sense of that word, such works can be restrained by injunction. Land is certainly more marketable when it is free from works of that character than when such works are established, although the neighbours may have the ordinary rights of citizens to engage in litigation against such works when they become a nuisance."

NEGLIGENCE—CONTRACT BY SERVANT TO DO DANGEROUS WORK ON THIRD PERSON'S PREMISES—CONTRACTOR—MAXIM "VOLENTI NON FIT INJURIA."

The case of *Membery* v. *Great Western Railway Co.*, 14 App.Cas. 179, was an action brought by the plaintiff to recover damages for injuries sustained by him under the following circumstances: The defendant company had agreed with the master of the plaintiff that the latter should shunt the defendants' trucks upon their line, and should supply horses and men for that purpose, the defendants to provide boys to assist in the shunting when they had boys, and when they had not the shunting was to be done without boys. For several years the plaintiff as a servant of the contractor shunted trucks on the defendants' track, sometimes with, and sometimes without, boys. The operation of shunting was, as the defendant knew, dangerous to any man performing it without assistance. The plaintiff on one occasion asked the defendant's foreman for a boy, but as the company could not provide one, proceeded to shunt trucks, and without any negligence on his part was injured by a truck running over him. At the trial a too sympathetic jury gave the plaintiff a verdict for £50. The Divisional Court (Mathew and A. L. Smith, JJ.,) refused to set aside the verdict, because they were of opinion that there was evidence of negligence on the defendants' part, and that under *Thomas* v. *Quartermaine*, 18 Q.B.D. 685, and *Yarmouth* v. *France*, 19 Q.B.D. 647, it was a question for the jury whether the plaintiff was *volens* within the meaning of the maxim *volenti non fit injuria*, and that there was evidence that the plaintiff did not act voluntarily. But on appeal to the Court of Appeal the verdict was set aside, and the action dismissed, on the ground that even if there was evidence of negligence on the part of the defendants, the plaintiff had acted voluntarily and with full knowledge of the danger he ran. This decision the House of Lords now sustains, both on the ground last mentioned, and also on the ground that there was no evidence of any negligence or breach of duty on the part of the defendants towards the plaintiff, and therefore he had no cause of action. On the much discussed question of the applicability of the maxim *volenti non fit injuria*, Lord Bramwell offers some pithy observations, holding in effect that whenever a man is not physically constrained, and he can at his option do a thing or not, and he does it, the maxim applies, and evidently regards the two cases above mentioned as establishing a "novel doctrine." Lord Herschell, however, is careful not to commit himself to any opinion as to the correctness of those decisions. The unsubstantial character of the plaintiff's case is thus neatly put by Lord Halsbury:

"The matter comes, therefore, to this, that the liability which is sought to be cast upon the company is that they have contracted with a man to shunt their trucks, that he has employed in his turn a servant of his to shunt the trucks, and that because it is said that it cannot be done without other assistance the railway company, forsooth, are under some particular contract to supply that which is necessary to be supplied in order that the thing may be done safely. My Lords, it seems to me to reduce the whole question to something too ludicrous to give verbal expression to."

LIBEL.—PRIVILEGE—REPORT OF PROCEEDINGS IN COURT OF JUSTICE—PUBLICATION OF JUDGMENT ALONE—EVIDENCE.

Macdougall v. *Knight*, 14 App.Cas. 194, is an appeal from the decision of the Court of Appeal 17 Q.B.D. 636, noted ante vol. 22, p. 395. The action was for libel in publishing a judgment of North, J., which contained reflections on the plaintiff, and which reflections the Court of Appeal, on the case being subsequently brought before it, thought were not justified by the evidence. The jury found that the pamphlet was a fair, accurate, and honest report of the judgment of North, J., and that it was published by the defendants *bona fide*, and with the honest intention of making known the facts of the case in order to protect their reputation and in reasonable self-defence; and that the publication was not malicious, which were the only issues raised on the pleadings. The plaintiff made no application to enter judgment for himself, notwithstanding the finding of the jury; but the plaintiff applied to the Divisional Court for a new trial, merely on the ground of misdirection, in the judge at the trial telling the jury that the occasion was privileged, and in telling them that if the pamphlet was a fair and honest report of the judgment its publication was privileged; and in not telling them that to be privileged it must be a fair and accurate report of all the proceedings at the trial; and also on the ground that the judge at the trial ruled that the plaintiff was not entitled on the pleadings to object that the paragraph of the defence which justified the publication, and upon which the plaintiff had taken issue, was bad in law; and also on the ground that the judge at the trial refused to allow the plaintiff to amend his reply by alleging that this paragraph of the defence was bad in law. The only point, however, argued before the Divisional Court and the Court of Appeal was whether the publication, being a separate and independent part of the proceedings, published alone and without disclosing all that took place at the trial, was privileged. Their Lordships were of opinion that the plaintiffs not having at the trial required the judge to put other questions than he did, to the jury, was too late in objecting on the score of non-direction either in the Divisional Court or the Appellate Court; and that not having by his pleading taken any objections to the legal validity of the defence set up, on the ground that the publication of the judgment alone without the evidence was not privileged, he was precluded from relying on that objection in appeal. Their Lordships were, however, of opinion that the publication of the reasons of judgment alone without the evidence or other proceedings, might, in some cases, be libellous, if properly attacked; and

that there is no presumption that a judgment contains a fair and full statement of all the matters upon which the judge is adjudicating; but that that is a question to be proved by evidence.

CANAL COMPANY—MINES UNDER, OR NEAR, CANAL—COMPENSATION FOR NOT WORKING MINES—RIGHT OF ACTION FOR INJURY TO CANAL.

Knowles v. *Lancashire & Yorkshire Railway Co.*, 14 App.Cas. 248, we noted ante vol. 24, p. 171, when before the Court of Appeal as *Lancashire & Yorkshire Railway Co.* v. *Knowles*, 20 Q.B.D. 391. The House of Lords affirm the decision of the Court of Appeal. It may be remembered that by an Act empowering a company to make a canal, it was provided that nothing in the Act should affect the right of any owners of lands to the mines and minerals under the lands to be made use of for the canal, and that it should be lawful for the owners to work the mines, not thereby injuring the canal. By another section it was provided that the canal company might treat and agree with the owners for any minerals necessary to be left for the security of the canal, and if they could not agree compensation was to be fixed by certain commissioners. Certain owners of minerals having notified the canal company that they intended to work the minerals under the canal the company refused to treat or pay any compensation therefor, and the owners then went on and worked the minerals, and thereby injured the canal; and the question was whether they were liable for such injury, and it was held that they were, and that they should have proceeded under the Act to obtain compensation.

MORTGAGOR, AND MORTGAGEE—TENDER—DETINUE—REMEDIES OF MORTGAGOR ON REFUSAL OF TENDER.

Bank of New South Wales v. *O'Connor*, 14 App.Cas. 273, disposes of a question on the law of mortgage of general interest. The plaintiff was a mortgagor, and having, as he claimed, made a legal tender of the mortgage debt to the mortgagee which was refused, brought the present action of detinue to recover his title deeds. The Judicial Committee of the Privy Council reversed the Supreme Court of New South Wales, and held that the action would not lie and that the plaintiff's only remedy was a suit for redemption, a tender improperly rejected not being equivalent to payment.

CROWN GRANTS OF LAND—RESERVATION IN PATENT OF RIGHT TO RESUME PART OF LAND GRANTED.

Cooper v. *Stuart*, 14 App.Cas. 286, though a decision under the law of New South Wales seems nevertheless to involve a question of interest in this Province. The question involved in the case was as to the validity of a reservation contained in a Crown grant of a right to the Crown to resume any quantity of the land granted, not exceeding ten acres, as may be required for public purposes. Similar reservations may be found, we believe, in many old patents issued in this province. It was contended that the reservation was repugnant to the grant, and therefore void; but the Judicial Committee held that it was not, but that when the resumption took effect it operated as a defeasance. Their Lordships also held that whether or not the Crown in England would be affected by the

rule against perpetuities, such rule was, nevertheless, inapplicable in 1823 to Crown grants of land in New South Wales, or to reservations or defeasances in such grants to take effect on some contingency more or less remote, and only when necessary for the public good.

B.N.A. ACT, 1867, S. 109—RIGHTS OF PROVINCE TO PRECIOUS METALS AFTER CONVEYANCE OF LANDS BY PROVINCE TO DOMINION.

The constitutional question involved in *The Attorney General for British Columbia* v. *The Attorney General for Canada*, 14 App.Cas. 295, was whether after the conveyance of public lands within the railway belt in British Columbia to the Dominion of Canada for the purposes of the construction of the Canadian Pacific Railway, the Province or the Dominion was entitled to the precious metals under such lands. The Supreme Court decided the question in favour of the Dominion, but the Judicial Committee reversed the judgment, and held the Province remained entitled to the precious metals notwithstanding the conveyance to the Dominion, on the ground that mines of gold and silver belong to the Crown by virtue of its prerogative, and that this prerogative right remained in the Province, not having been expressly granted by the conveyance of the lands to the Dominion.

GRANT OF ADMINISTRATION VESTS TITLE AS FROM DEATH—RIGHTS AND LIABILITIES OF HUSBAND AS WIFE'S ADMINISTRATOR.

Harding v. *Howell*, 14 App.Cas. 307, is a case which, though decided under the law of Victoria, is of some practical interest in this Province, as to the effect of our Devolution of Estates Act. The facts of the case were simple. A wife died, entitled to lands under certain voluntary conveyances from her husband. Her husband after death purported to convey these lands to a purchaser for value. Subsequently the husband took out administation to his wife's estate. It was held by the Judicial Committee that the effect of the letters of administration was to vest the wife's estate in the lands in question in the administrator as from the date of her death as trustee to realize and distribute them according to law as assets of her estate, and that if the conveyance by the husband was *bona fide* for value, the husband was guilty of a breach of trust; and if not *bona fide* it was inoperative; and in either view the husband was chargeable with the value of the lands.

PRACTICE—AMENDMENT OF RULE NISI—DISCRETION OF COURT.

The short point of practice disposed of by the Judicial Committee in *Australian Navigation Co.* v. *Smith*, 14 App.Cas. 318, was simply this: Both parties at the trial treated an issue as one which should be decided by the judge and not the jury, and the appellants afterwards moved for a new trial on the ground that the judge had decided wrongly. On this application he applied for leave to

amend his motion by setting up that the judge should have left such issue to the jury, and their Lordships were of opinion that the Court below had exercised a sound discretion in refusing the amendment.

ADMISSION TO PRACTICE AS AGENT IN THE PRIVY COUNCIL.

In re Twidale, 14 App.Cas. 328, the Judicial Committee refused to admit a gentleman, who was a pleader in the High Court of Calcutta, to be registered as an agent to practice in the Privy Council, on the ground that the Rules of 30th of March, 1870, only authorized the Committee to admit persons who had been admitted as solicitors in India or the colonies, and the applicant had not been admitted as a solicitor.

EXPROPRIATION OF LANDS—RIGHT OF EXPROPRIATOR TO CALL FOR A TRANSFER.

The Colonial Secretary of Natal v. *Behrens*, 14 App.Cas. 341, is authority for the proposition that when a statute authorizes the expropriation of land or a patent reserves right to the Crown to resume part of the land granted, but is silent as to the making of any transfer, the expropriator is not entitled to call upon the owner of the lands expropriated or resumed to execute a transfer thereof, and a provision in an Act requiring an owner to transfer upon payment of compensation does not apply to cases where land is authorized to be taken under a reservation in a patent, or under a statute, without any compensation.

Reviews and Notices of Books.

Federal Government in Canada. By Dr. J. G. BOURINOT.

The interesting and exceedingly instructive series of lectures delivered in June last, before Trinity University, Toronto, is now republished in full in the Historical and Political Science Series of the Johns Hopkins University, of Baltimore. The demands on our space prevent us from reviewing these lectures in this issue, but we purpose referring them in our next number.

Notes on Exchanges and Legal Scrap Book.

BANKING LAW.—The tendency to specialization in legal practice is marked, and as the community increases in wealth, and the intricacy of the relationships brought about by advancing civilization is multiplied, this tendency must be strengthened. Its effect on legal journalism has hitherto not been marked. Among the recent candidates for professional recognition and subscriptions is one which gives its attention to our department. Its name indicates its chosen field. *The Banking Law Journal* is published semi-monthly at New York. Thomas B. Paton is the editor and proprietor. This magazine has now reached its ninth number, and promises to be a valuable addition to the already somewhat long list of legal periodicals. It is carefully edited, and its articles are of much interest. We cordially welcome it as an exchange.

A JURY AT A PRAYER MEETING.—A somewhat peculiar set of circumstances led to an application for a new trial in *Shaw* v. *Slate*, which was granted. The case was noted in the *Albany Law Journal* a short time ago. The facts are given in the following extract from the judgment of the Supreme Court of Georgia, before which the motion for a new trial was argued: These affidavits show, in substance, that pending the trial and after the argument to the Jury had begun, night came on, and the court took a recess until the following morning, and instructed the bailiff who had charge of the jury, and the jury themselves, not to allow any one to speak to them, or to speak in their presence about the cause, nor to discuss it among themselves until the argument in the case was concluded; that during that night the bailiff took the jury from the jury-room (where he was ordered to keep them) to a church where a prayer-meeting was being held, conducted by the pastor, who was the active prosecutor in the case; that upon their arrival at the church, the prosecutor, Mr. Hooten, politely assigned the jury to seats in the church, separate and apart from the congregation, and that he addressed the jury. The affidavits further show that upon the termination of the exercises the jury left the church and mixed with the crowd, some of the congregation going out before and some after the jury. The State introduced a number of affidavits to show that while the jury attended the meeting at the church, they were given seats wholly apart from the congregation, and that no reference was at any time made to "any law case whatever;" that they left the church in a body in charge of the bailiff, without mixing with the crowd, and without any person having any opportunity to have a conversation with them, either while they were at the church or when they were leaving it; and that the prayer to which reference is made on the seventh ground of the motion made no further reference to the court and jury in said case than to ask "that the blessings of God might rest upon our government, with its officers, and that God would bless the officers of the court then in session, that they might be guided aright in the discharge of their duties." The bailiff, who was in charge of the

jury, made an affidavit that during the trial no one spoke of the case in the presence of the jury, and that nothing was said about the prisoner in their presence; that he was careful to guard them, and not thinking that it was improper, had gone with them to the prayer-meeting; that on their way to and from church they did not separate, nor was anything said to them, or any of them, or in their presence, about the case; and that at the church they were seated apart from the congregation, and that the usual services were held, and nothing was said about the case. The jurors also made affidavits, in which they say that they attended the prayer-meeting in a body and did not disperse or separate; that they were provided with seats together, apart from the rest of the congregation; that the services were such as are usual at prayer-meetings, and that nothing was said by any one in reference to the case. The conviction was reversed and a new trial was granted.

DREAMS BEFORE THE LAW COURTS. — In the year 1695 a Mr. Stockden was robbed and murdered in his own house, in the parish of Cripplegate. There was reason to believe that his assailants were four in number. Suspicion fell on a man named Maynard, but he succeeded at first in clearing himself. Soon afterwards a Mrs. Greenwood voluntarily came forward and declared that the murdered man had visited her in a dream, and had shown her a house in Thames Street, saying that one of the murderers lived there. In a second dream he displayed to her a portrait of Maynard, calling her attention to a mole on the side of his face (she had never seen the man), and instructing her concerning an acquaintance who would be, he said, willing to betray him. Following up this information, Maynard was committed to prison, where he confessed his crime and impeached three accomplices. It was not easy to trace these men, but Mr. Stockden, the murdered man, again opportunely appeared in Mrs. Greenwood's dreams, giving information which led to the arrest of the whole gang, who then freely confessed, and were finally executed. The story is related by the curate fo Cripplegate, and "witnessed" by Dr. Sharp, then Bishop of York.

On this story be it remarked that Mrs. Greenwood's dreams only verified suspicions already aroused. Maynard had been suspected at first; her dream brought home the guilt to him. It did not deal with his accomplices until Maynard, in his turn, had implicated them.

A somewhat similar incident came before a legal tribunal nearly a century afterwards, when two Highlanders were arraigned for the murder of an English soldier in a wild and solitary mountain district known as "the Spital of Glenshee." In the course of the "proof for the crown," to use the phrase of Scottish law, another Highlander, one Alexander McPherson, deposed that on one night an apparition appeared to come to his bedside, and announced itself as the murdered soldier, Davies, and described the precise spot where his bones would be found, requesting McPherson to search for and bury them. He fulfilled but the first part of the behest, whereupon the dream or apparition came back, repeated it, and called its murderers by their names.

It appears that, with the strangely stern common sense which in Scotland exists side by side with the strongest imaginative power, the prisoners were acquitted principally on account of this evidence, whose "visionary" nature threw discredit on the whole proceedings. One difficulty lay in the possibility of communication between the murdered man and the dreamer, since the one spoke only English and the other nothing but Gaelic. Years afterwards, however, when both the accused men were dead, their law agent admitted confidentially that he had no doubt of their guilt.

Singularly enough, a story strikingly similar in many of its details found its way before a criminal tribunal in our own century.

In the remote and sequestered Highland region of Assynt, Sutherland, a rustic wedding and merry-making came off in the spring of 1830. At this festivity there figured an itinerant peddler named Murdoch Grant, who, from that occasion, utterly disappeared. A month afterwards, a farm servant, passing a lonely mountain lake, observed a dead body in the water, and on its being drawn ashore the features of the missing peddler were recognized. He had been robbed, and had met his death by violence. The sheriff of the district, a Mr. Lumsden, investigated the affair without any result, in his searches being aided by a well-educated young man of the neighborhood, one Hugh McLeod, ostensibly a school-master, but then without employment.

One day the sheriff, chancing to call at the local post office, Macleod's name, probably owing to the part he was taking in these investigations, came into the conversation, and the postmaster casually remarked that he should not have thought Macleod so well off, he having recently changed a £10 note at his shop. Mr. Lumsden's suspicions were aroused by this, and on his asking Macleod a few questions on the matter he proved the young man to be untruthful. Therefore he put him under arrest, and caused his home to be searched, But none of the peddler's property being found there, and no other suspicious circumstance transpiring, he was about to be released, when a tailor named Kenneth Fraser came forward with the following extraordinary story:

In his sleep he declared that the Macleods' cottage was presented to his mind, and that a voice said to him in Gaelic, "The merchant's pack is lying in a cairn of stones, in a hole near their house." The directions given in this dream were carried out by the authorities; articles belonging to Grant were discovered, and the murdered man's stockings were presently found in Macleod's possession. He was accordingly charged with the crime. Kenneth Fraser formulated the evidence of his dream with great firmness and consistency. Macleod was condemned and executed, but not before making a full confession of his guilt.

Here, again, as in the case of Mrs. Greenwood, we may notice that the dream is only revealed after suspicion had been already aroused. Fraser was a boon companion of Macleod's, and it has been suggested that in their carousings he got some hint of his comrade's terrible secret. A somewhat similar explanation might serve to account for McPherson's dream of the murdered English soldier, and even the antique visions of Mrs. Greenwood. The form of a dream was a

convenient one in which either to veil a guilty complicity, or, in the case of the Highlanders, to escape that imputation of being an "informer" which is so hateful to the Celtic heart.

There is, however, an equally modern and less remote instance of a similar sort. In 1828, in Suffolk, Maria Martin was slain by her false lover—a crime known in sensational literature as "The Murder in the Red Barn." The step-mother of the deceased (says Mr. Chambers in his "Book of Days") gave testimony on the trial that she had received in a dream that knowledge of the situation of the body of the victim which led to the detection of the murderer.

The late Mr. Serjeant Cox, at a meeting of the Psychological Society in the year 1876, narrated a remarkable case which had come within his own experience in which dreams had played an important part, and the evidence for which he had himself heard given on oath in open court.

A murder had been committed in Somersetshire. A farmer had disappeared and was not to be found. Two different men, living in different villages, some distance from where the farmer had disappeared, both had a dream upon the same night, and stated the particulars to the local magistrates. They said they had dreamed on that particular night that the body was lying in a well in the farm-yard. No well was known to be there at all, so the two men were laughed at. Some persons, however, went to the yard and, although there was no appearance of a well, they at last found one under some manure, and the body was in it; then, of course, on the principle of the proverb, "He who hides can find," the public began to suspect the two men themselves. But it was finally proved that the farmer had been murdered by his own two nephews, who had afterwards disposed of his body thus. Before these dreams the dreamers had known nothing about the well in the yard. The nephews were hanged for their crime.—*Argosy.*

JUDGES WHO HAVE NOT RETIRED.—A London news agency circulated a rumor to the effect that the Master of the Rolls would resign his position before the long vacation, and that he would be succeeded by the Attorney-General. The statement should be read with a great deal of reserve. Lord Esher has already been retired at least four times—by the newspapers. Just before the long vacation the legal atmosphere of the east end of the Strand becomes charged with rumors, and the ubiquitous reporters of the law courts are busy with their speculations. Months back they started the canard that the Lord Chief Justice was anxious to retire, and he was only prevented from doing so by the fear that Sir Richard Webster would be promoted to his position. Lord Coleridge has taken up a strong position on the Home Rule question, and it is well known that he has not viewed Sir Richard's conduct of the Parnell Commission with particular favour. But for none of these reasons does he still retain the most lucrative judicial appointment next to the Lord Chancellorship. The explanation of these unfounded and somewhat absurd rumors is that judges are in the habit of retiring during the long vacation, and immediately a member of the bench is entitled to his pension the gossips begin to make free with his name.

They do this on the assumption that when a judge's term of service has expired he is anxious to wipe the dust of the law courts from his feet, and retire to the enjoyment of his well-earned pension. This is not by any means the rule, and indeed, except in cases of old age or failing health, judges stick to their post long after they have "served their time." The life of a judge must be an agreeable one, as we rarely hear of one retiring, except under urgent physical circumstances, until he can do so full of honours.

A judge is entitled to retire on a pension after a service of fifteen years. Five members of the High Court of Judicature have served that time and are entitled to the pension. They are, Sir James Hannen, President of the Probate, Divorce and Admiralty Division; Lord Esher, Master of the Rolls; Mr. Justice Denman, Baron Pollock and Lord Chief Justice Coleridge. Hence we may expect the usual paragraphs to go the round of the London papers during the next fortnight, on the possibility or the probability of some of these gentlemen vacating their distinguished posts.

Sir James Hannen was appointed twenty-one and a half years ago. He has untied more matrimonial knots than any man in Great Britain, but he will be more conspicuously mentioned in history in connection with the Parnell commission. As this inquiry is adjourned over to the next sittings, it is clear that Sir James does not contemplate immediate retirement. The President's salary is no more than that of his coadjutor, Mr. Justice Butt, or any of the common-law judges.

Lord Esher was promoted from the common-law side of the courts to the virtual presidency of the Appeal Court. He attains his majority this month. Of a spirited temperament, Lord Esher sometimes gets a little impatient with vacillating counsel. He has a large development of the humorous faculty, possesses keen perspicacity and legal acumen, has an intuitive grasp of technique, and a splendid physique. In his youthful days he was a noted athlete. He was famous for his skill in rowing, and between 1840 and 1845 he was thrice a member of the Cambridge crew. He stands six feet in his stockings, is in robust health, and the rumor which yesterday found its way into some papers is but idle conjecture. As Master of the Rolls he draws £6,000 a year.

Next to Lord Coleridge Mr. Justice Denman is senior puisne judge. His health has not been of the best lately. He is in his seventieth year, and earned his retiring allowance in October two years ago. Baron Pollock is sixty-six, and was entitled to retire last January twelvemonth. He is not quite so good of hearing as he used to be. If there are any vacancies during the ensuing long vacation caused by the retirement of full-service judges, one or both of the last named will disappear from the list.

Lord Coleridge draws the highest salary among what may be called the regular judges, his services being appraised at £8,000 a year. For forty years Lord Coleridge has been the political friend and admirer of Mr. Gladstone, with whose Home Rule proposition he is in hearty accord. He is a fearless, intrepid, conscientious judge. He only sat in Parliament eight years, viz., 1865-1873, but in that short time he successfully graduated through the solicitor-general and

attorney-generalships. In 1873 he declined the Mastership of the Rolls, but in the same year was appointed Chief Justice of the Court of Common Pleas on the death of Sir William Bovill; and nine years ago he succeeded Sir Alexander Cockburn as Lord Chief Justice of England.

In February next Mr. Justice Field will be entitled to leave the Bench, and as he is exceedingly deaf, he will probably avail himself of his pension at an early date. If you met Sir William Ventris Field in the Strand, you would hardly think that the light step and jaunty air belonged to a man who six years ago attained the "allotted span." Sir William is very jealous of the honour of solicitors. He was articled to a firm of solicitors himself in the '30's, and later on was a member of the firm of Thompson, Debenham & Field.

Baron Huddleston, who received a judgeship in the same year as Mr. Justice Field, has been on the sick list for some months, and several more or less veracious statements have appeared with reference to his pending retirement. He will probably, however, retain the office for another six months. Sir John Walter Huddleston is the last of the Barons of the Court of Exchequer. When he travelled the Oxford Circuit he appeared in almost every case of importance, and particularly distinguished himself for his splendid defence of Cuffy the Chartist, of Mercy Newton in her three trials, of Mrs. Firebrace in the Divorce Court, and of Pook for the Eltham murder. He also assisted Sir Alexander Cockburn in the prosecution of Palmer, the notorious poisoner. As a politician he was a most unsuccessful candidate for parliamentary honours. Six times he was defeated at the poll, but was eventually successful at Canterbury, and again at Norwich.

Mr. Justice Manisty and Mr. Justice Hawkins were both appointed to the judicial bench thirteen years ago. Sir Henry Manisty is the son of a late vicar of Edlingham, and a most extraordinary travesty of justice was brought to light several months back. Some years ago two men were indicted before Sir Henry for burglary and attempted murder at the very vicarage in which Sir Henry was born. The men were found guilty, and Sir Henry sentenced them to penal servitude for life. When the men had "done" several months other men confessed to the crime, and were eventually convicted, the wronged men being released and compensated by Parliament. Sir Henry tried the actions for libel against Lord Chief Justice Coleridge, brought by the man who sought to be, and now is, the Chief's son-in-law. The jury awarded the plaintiff £2,000 damages, but the judge reversed the decision and entered the verdict for the defendant. This action caused some surprise, which was not lessened by the report that Lord Coleridge and Mr. Justice Manisty were not on terms of personal friendship at the time. Sir Henry is in his eighty-second year. His hearing is not so very good, but he is a painstaking and industrious judge.

Mr. Justice Hawkins is as well known at Epsom as he is at the Old Bailey. He is a great authority on all matters concerning the turf, and is a prominent member of the Jockey Club. He long ago earned the title of "hanging judge." It is said he has sent more people to the gallows than any other man living in the same period of time. It is noticed that when a wretch is before him on the capital charge he is exceedingly temperate in tone and language, but he observes

an inflexible firmness after the verdict. As a counsel he had a distinguished career. He appeared for Simon Bernard, who was tried as an accessory to the conspiracy against the life of the Emperor Napoleon in 1858. He was in the great Roupell cases; he led the defence in the famous convent case—*Saurin* v. *Starr;* and when the present leader of the House of Commons seat was petitioned against he saved it for him. As a piece of masterly cross-examination the way in which he handled Mr. Bagient in the first Tichborne trial stands almost unrivalled. When the claimant was prosecuted by the Crown Mr. Hawkins led for the Crown; and the Gladstone and Von Reable cases were among his victories in the Divorce Court. Before he was elevated to the Bench he held a general retainer for the Jockey Club. On the Bench he is noted as the manufacturer of indifferently good jokes. Sir Henry recently followed the example of his distinguished Chief and married a young and pretty lady. He usually wears a brown jacket, and a silk hat far back on his head. To see him and Baron Huddleston leaving the law courts and walking arm-in-arm through Holywell Street is a sight for the gamin.

Mr. Justice Stephen, who tried Florence Elizabeth Maybrick for the murder of her husband, was raised to the Bench in 1879. He was a great criminal lawyer, and the most successful of his books, which has become a standard work, is "The Law of Evidence." He speaks as if he had adopted Demosthenes' recipe for stuttering.

The other members of the common-law Bench are Justices Mathew, Cave, Day, Smith, Wills, Grantham, and Charles. Sir James Charles Mathew was promoted from the junior bar; Sir Lewis William Cave edited, in conjunction with Mr. Bell Stones, "Practice of Petty Sessions"; and Sir John Charles Day edited "Common Law Procedure Acts," and "Roscoe's Nisi Prius"; Sir A. L. Smith is a member of the Parnell commission; Sir William Grantham was well known as a politician, and Sir Arthur Charles is one of the youngest judges of modern times.

There are only two ex-members of the judicial Bench alive. Sir James Bacon is ninety-one, and continued in harness until three years ago. When he retired there was a unique scene in the Chancellor's Court. The attorney-general and most of the leading members of the Bar said *au revoir* to him in neat and touching speeches. Sir William Robert Grove was an eminent electrician before he was promoted to the Bench. He contrived the powerful voltaic battery which bears his name. He was Professor of Experimental Philosophy at the London Institution, and his address on the "Continuity of Natural Phenomena" before the British Association in 1866 demonstrated that the changes in the organic world, in the succession of organized beings, and in the progress of human knowledge, resulted from gradual minute variations. He made several discoveries in electricity and optics.

When a judge retires from the Bench he does so in an unostentatious manner, generally writing to the Lord Chancellor to be relieved during a vacation, and at the next sittings a new judge takes his place, and is formally congratulated by the Bar.—*Herald, London Edition.*

DIARY FOR OCTOBER.

1. Tues...County Court Non-Jury Sittings exept in York. Maritime Court sits. William D. Powell. 5th C J. of Q.B., 1816.
6. Sun.....*Sixteenth Sunday after Trinity.*
7. Mon....County Court Sittings for Motions, except in York. Henry Alcock, 3rd C.J. of Q.B., 1802. R. A. Harrison, 11th C.J., of Q.B., 1875.
12. Sat.....County Court Sittings for Motions, except in York. end. Columbus discovered America, 1492.
13. Sun.....*Seventeenth Sunday after Trinity.* Battle of Queenston, 1812. Lord Lyndhurst died, 1863 æt. 92.
15. Tues...English law introduced into Upper Canada, 1793.
18. Fri.....St. Luke.
19. Sat.....County Court Sittings for Motions in York end. Last day for notices for Prim. Exam.
20. Sun.....*Eighteenth Sunday after Trinity.*
21. Mon....County Court Non-Jury Sittings in York. Battle of Trafalgar, 1805.
22. Tues..Supreme Court of Canada sits.
23. Wed...Lord Lansdowne, Governor-General, 1883.
27. Sun.....*Nineteenth Sunday after Trinity.* Hon. C. S. Patterson, appointed Judge of Supreme Court, 27th October, 1888. Hon. Jas. MacLennan appointed Judge of Court of Appeal, 27th October, 1888.
29. Tues...Primary Examinations.
31. Thu....Admission of graduates and matriculants. All Hallows' Eve.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

MACLENNAN, J.]

HAY *v.* BURKE.

Bills and notes—Notice of dishonour—To what place to be addressed—Place designated under signature—R.S.C., c. 123, s. 5.

Where it is intended to designate under the provisions of R.S.C., c. 123, s. 5, a place to which notice of dishonour may be sent other than the place at which the bill or note is dated, it is sufficient if the name of a place is written under or beneath the signature of the party. "Under his signature" does not mean that the name of the place must be written by the party's own hand; it may be written by another person if that other person had in any manner any kind of authority from the party to write it.

Where a place had been so designated, the holder of the instrument may send notice to the party's place of residence or place of business.

Cosgrave v. *Boyle*, 6 S.C.R., 165, considered and applied.

Judgment of the First Division Court of Wentworth affirmed.

MacKelcan, Q.C., for the appellant.

G. F. Shepley for the respondent.

[June 29.

MCDONALD *v.* JOHNSTON.

New trial—Trial without a jury—Rejection of evidence.

This was an appeal by the plaintiff from the judgment of STREET, J.

The action was brought to set aside a conveyance made by the plaintiff in favour of the defendant, and in the statement of claim it was charged that the conveyance in question was never executed or delivered by the plaintiff, but that the alleged execution thereof was obtained by the defendant's fraud, and that the plaintiff signed the conveyance thinking that he was signing another instrument relating to the estate of his deceased wife. There was also a general charge that the execution of the conveyance had been obtained by the fraud and undue influence of the defendant, but there were no specific allegations as to the nature of the fraud or undue influence. The statement of defence was a mere general denial of the allegations set out in the statement of claim. At the trial the plaintiff tendered evidence as to the defendant having induced him to drink to excess about the time of the transaction in question; as to the plaintiff's want of education or business capacity and other evidence of that nature, and also evidence as to the position of the wife's estate and as to the transactions between the parties in connection with it, but the learned Judge ruled that this evidence could not be introduced under the general allegations contained in the statement of claim, and at the end of the case gave judgment in favour of the defendant.

The plaintiff appealed, and the appeal came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 23rd and 27th of May, 1889.

The Court were of opinion that the exclusion of evidence had been pushed too far, and that for a proper determination of the real merits of the case it would be advisable to admit evidence of every circumstance, declaration, or negotiation between the parties, which could throw any light on conduct or motive, and they ordered a

new trial, costs to abide the final result, each party having leave to amend.

Moss, Q.C., and *Code* for the appellant.

J. H. Macdonald, Q.C., for the respondent.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

FALCONBRIDGE, J.] [Sept. 9.

In re ARMSTRONG AND THE TOWNSHIP OF TORONTO.

Municipal corporations—By-law in aid of harbor works—Raising money by loan—Time of repayment uncertain—R.S.O., c. 184, s. 340, s-s. 2; s. 293, s-s. 1—Submitting by-law to electors—Day fixed for taking votes—Motion to quash—Applicant voting against by-law not estopped—Costs.

Section 340 of the Municipal Act, R.S.O., c. 184, which authorizes municipal councils to pass by-laws for contracting debts, etc., provides, s-s. 2, that the whole of the debt and the obligations to be issued therefor shall be made payable in twenty years at furthest, from the day on which such by-law takes effect.

A by-law of a municipality to raise by way of loan $3,000 to aid in repairing harbour works, provided that the debentures should be made payable annually, the first payment to be made on the 15th day of December in the year next succeeding the year in which the "repairs will have been completed."

Held, that as the time of repayment was uncertain, the by-law was not in accordance with s. 340, s-s. 2, and was therefore illegal and should be quashed.

Semble, also, that it was a fatal objection to the by-law that the day fixed by it for taking the votes of the electors thereon was more than five weeks after the first publication, contrary to s. 293, s-s. 1, of the Act.

Held, also, that the applicant had not by voting *against* the by-law disentitled himself to apply to the court to quash it, or to the costs of his motion.

E. G. Graham for the applicant.

Beynon, Q.C., and *Ritchie*, Q.C., for the township.

GALT, C.J.] [Sept. 27.

Re NOBLE *v.* CLINE.

Prohibition — Division court — Territorial jurisdiction—Where cause of action arose.

The plaintiff resided in the district of Algoma and the defendant in the county of Wentworth. The defendant telegraphed from Wentworth an order for a ton of fish to be sent him by the plaintiffs, and the latter shipped the fish from Algoma to Wentworth. The plaintiffs sued for the price of the fish.

Held, on motion for prohibition, that the whole cause of action arose in Algoma, and a Division Court there had jurisdiction.

Cowan v. *O'Connor*, 20 Q.B.D., 640, and *Newcomb* v. *De Roos*, 2 E. & E., 271, followed.

Shepley for the plaintiff.

Aylesworth for the defendant.

Chancery Division.

Div'l Ct.] [June 12.

Re WALLIS *v.* VOKES.

Mechanics' Lien—Prior conveyance—Notice of lien to purchaser—Validity of lien—Proceedings to realize—Summary application to discharge.

S. was the owner of a lot upon which he was building four houses, and W. was his plumbing contractor, doing the work on all at a specified sum for each house. He commenced his work in September, 1887, and finished about May, 1888. V. was the contractor for the brickwork, and as such was on the premises from time to time while the work was going on, and was not paid by S. V. purchased one of the houses, which was conveyed to him by S. by deed dated Dec. 1st, 1887, and registered Feb. 20th, 1888. On Feb. 24th, 1888, W. registered his lien on the whole property. Both V. and W. alleged that they knew nothing of the other's transaction. On an appeal from ROBERTSON, J., who held (affirming the Master in Chambers) that V. had notice of W.'s claim and that his summary application to have his lien discharged must be dismissed with costs, the Court were evenly divided.

Per PROUDFOOT, J. A lien should be registered against anyone whose rights are acquired during the progress of the work, and if not so

registered it becomes absolutely void unless proceedings are taken to realize within thirty days. No proceedings were taken within that time by W., and the lien not being registered ceased against the subsequent owner to be a lien at all.

Hynes v. *Smith*, 27 Gr., 150, and *McVean* v. *Tiffin*, 13 A.R. 1, followed.

Per FERGUSON, J. The real question is not whether there was a val d registration of the lien, but whether the judgment of ROBERTSON, J., affirming the refusal of the Master to discharge the lien on a summary application was right. The Master was justified in so refusing.

Wanty v. *Robins*, 15 O.R., 474, referred to.

Geo. MacDonald for the appeal.

Masten contra.

Div'l Ct.] [June 10.

MASON *v.* BERTRAM *et al.*

Master and Servant—Workman's Compensation for Injuries Act—Damages—Death from accident—Reasonable expectation of benefit from life of deceased.

The plaintiff's son had grown up and was intending to study to be a doctor, in which course the plaintiff intended to aid him by furnishing the necessary money. Just before he commenced such course he entered the employment of the defendants in their machine shop, and was injured by the falling of some iron lathes, from the effects of which he died. In an action by his father as administrator it was

Held, that under the circumstances the plaintiff could have no reasonable expectation of benefit from the son's life, and that the verdict obtained at the trial should be set aside and a nonsuit entered.

A notice of action under the Workman's Compensation for Injuries Act does not require to be signed or to be given on behalf of anyone.

Osler, Q.C., for the motion.

Lynch Staunton contra.

ROBERTSON, J.] [Sept. 2.

WILLIAMSON *et al. v.* WILLIAMSON.

Will—Absence of subscribing witnesses—Want of proof of their existence or handwriting—Action to establish will.

In an action to establish a will which was produced in the handwriting of the testator, purporting to be executed in the presence of two subscribing witnesses, who could not be found and whose handwriting could not be proved, a motion for judgment asking to have the will established and probate thereof granted, notwithstanding that all parties interested consented, was dismissed and the application refused on the ground that sufficient evidence had not been produced to show that such will was the will of the testator under R.S.O., c. 109, s. 12.

Millican for the plaintiffs.

Weir for the defendants.

FERGUSON, J.] [Aug. 29.

THE CORPORATION OF THE CITY OF KINGSTON *v.* THE CANADA LIFE ASSURANCE COMPANY.

Assessment and taxes—Insurance Company—Head office and branch office—Meaning of "branch" or "place of business" in Assessment Act—Assessment of income at branch office.

The defendants were a Life Assurance Company with their head office in H., and transacted business by agents in K., where they received applications for insurances which they forwarded to the head office, from which all policies were issued ready for delivery—the premiums on same also being collected in K. In an action by the corporation of the city of K. to recover taxes assessed against the defendants on income, in which the defendants contended that they had no place of business in K., that their only place of business was in H., and that their business was of such a nature that they could not be assessed at K., but might elect, and in fact had elected, under R.S.O., c. 193, s. 35, s-s. 2, to be assessed at H. on their whole income, and were consequently not liable to plaintiffs. It was

Held, that the defendants had a branch or place of business at K., that as the evidence was that the agent at K. could show each year the gross amount of his receipts; and as the words "gross income" were used in the statute, the amount of premiums received year by year at K. was assessable at that branch or agency, and that the plaintiffs were entitled to succeed.

Walkem, Q.C. and *Agnew* for plaintiffs.

Bruce, Q.C., for defendants.

Full Court.] [Sept. 9.

BANK OF MONTREAL *v.* BOWER.

Will—Devise—"Wish and desire"—Precatory trust—Estate in fee.

Held, affirming the decision of Ferguson, J., 17 O.R., 548, that the words of the will in question did not create a precatory trust, and that the wife took the property absolutely.

Per BOYD, C.—If the entire interest in the subject of the gift is given with superadded words expressing the motive of the gift, or the confident expectation that the subject will be applied for the benefit of particular persons, but without in terms cutting down the interest before given, it will not now be held, without more, that a trust has been thereby created.

Moss, Q.C., and *Kidd* for the defendants.

Robinson, Q.C., and *Code* for the plaintiffs.

Full Court] [Sept. 12.

ROBLIN *v.* MCMAHON.

Statute of limitations—Acknowledgment—Depositions in another action—21 Jac. 1. c. 16—R.S.O., 1887, c. 123, s. 1.

In an action for a debt incurred more than six years before writ issued, two documents were relied on as constituting such acknowledgments as stopped the running of the statute of limitations. One was a letter from the defendant in which he said: "I am of the opinion that it will be impossible for me to pay you anything until my son's estate is wound up, which will not be before the last of March or the beginning of April."

The other was a part of the examination of the defendant in a certain other action brought for the administration of his said son's estate, the examination being in reference to a claim set up by the defendant against the said estate, in which he admitted the receipt of the money for which the present action was brought, and stated that he was responsible to the testator of the present plaintiff who was an executor for it. There was evidence, also, that the son's estate was wound up, and that the defendant received more than sufficient to pay the plaintiff's claim.

Held, affirming the decision of Falconbridge, J., that the letter was a sufficient acknowledgment under the statute, and meant that on the son's estate being wound up, the defendant would pay, and the said estate having been wound up, anything conditional in the letter had been ascertained.

Held, also, that the statute was satisfied by an acknowledgment made and signed as in the testimony of the defendant in the administration action.

C. J. Holman for the defendant.

Masten for the plaintiff.

ROSE, J.] [Sept. 17.

BLAIN *v.* PEAKER.

Assignment for creditors—Personal estate only—48 Vict., c. 26, (O.)

An assignment for the benefit of creditors, though confined in terms to the assignor's personal estate, professed to be drawn under 48 Vict., c. 26, O.

Held, that it was nevertheless not within the Act; and this action, being brought by the assignee to set aside a chattel mortgage, must be dismissed with costs.

It is clear that it was intended under the Act to bring all the estate into the hands of the assignee for general distribution.

Meyers for the plaintiff.

McFadden for the defendant.

BOYD, C.] [Sept. 25.

REDICK *v.* SKELTON.

Arbitration and award—Publication, what is—Right of arbitrators to declare lien.

Motion to continue an injunction.

Held, that an award is published (for the purpose of regulating the time for an application to set it aside) when the parties have notice that it may be had on payment of charges. It is not needful that there should be notice of the contents of the award before it can be said to be published.

Arbitrators, upon a reference to settle disputes between partners, found the balance due from the firm to one of the partners, and that this balance was a lien upon the assets to be paid out of them specifically.

Held, that they had the power to give this direction, and the partner in question had power to sell to satisfy that lien out of the specific property applicable of which he was joint owner.

C. J. Holman for the applicant.

Marsh contra.

BOYD, C.] [Sept. 25.

RE CHANDLER AND CHASE.

Will—Construction—Life estate—Remainder to sons—Rule in Shelley's case.

Vendor and purchaser application.

A will contained the following clause: "To my son, G. W., I give and bequeath during his lifetime the s. e. ¼ of said lot 4 before mentioned, and at his death to go to and be vested in his son W.C., or in case other sons should be born to my son G.W. then to be equally divided between all of the boys."

Held, that G. W. took a life estate only, and that there was a vested remainder in fee in his sons as a class which would let in all born before his death.

Atkinson, Q.C., for the vendor.

Holman for the purchaser.

BOYD, C.] [Sept. 26.

RE NORTHCOTE.

Will — Construction — Devise — Restraint on alienation.

After a devise to his son C. of certain lands his heirs and assigns for ever, a testator added that his devise to C. was subject to this express condition, that he should not sell or mortgage the land during his life, but with power to devise the same to his children as he might think fit in such way as he might desire.

Held, that the case was governed by *Re Winstanley*, 6 O.R. 315, and that the property was not clothed with a trust in favour of the children, but the devisee took it in fee simple with, however, a valid prohibition against selling or mortgaging it during his life.

J. R. Roaf for purchaser.

J. M. Clark for vendor.

Practice.

MR. DALTON.] [Sept. 7.

SHAW *v.* CRAWFORD.

Notice of trial—Action in Chancery Division—Assizes—Chancery sittings—Right of defendant to give notice of trial—Rule 654.

In an action in the Chancery Division in which no jury notice had been given, the defendant gave notice of trial for the Assizes, beginning 10th September. 1889, and the plaintiff for the Chancery Sittings, beginning 4th November, 1889.

Held, that under Rule 654 either party has the right to give notice of trial for the next sittings, whether an Assize or a Chancery sittings; and the plaintiff cannot take away the right from the defendant by giving notice of trial for a later sittings.

The plaintiff's motion to set aside the defendant's notice of trial was therefore refused.

Palmateer, v. *Webb*, 7 C.L.T., Occ.N., 244, distinguished.

C. A. Durand for plaintiff.

R. S. Neville for defendant.

MR. DALTON.] [Sept. 21.

ESSERY *v.* GRAND TRUNK RAILWAY CO.

Solicitors—Agents in county towns—Posting up papers where no agent booked—Rules 203, 204, and 461.

Where a solicitor has not entered the name of an agent for him in a county town, service of papers in an action where the proceedings are being carried on in such county town cannot be effected upon him by posting up copies in the office of the local registrar there, if he has the name of a Toronto agent duly entered.

Rules 201, 204, and 461 considered.

Macnish for plaintiff.

Aylesworth for defendants.

BOYD, C.] [Sept. 24.

GIRVIN *v.* BURKE—BURKE *v.* GIRVIN AND SPENCE.

Consolidation of actions — Conduct of consolidated cause—Priority in time — Burden of proof— Scope of actions.

In determining which party is to have the conduct of a consolidation of two cross-actions, the main *indicia* to be regarded are, which action was first begun? Upon whom does the chief burden of proof lie? Which action is the more comprehensive in its scope?

And where G. first sued B. for cancellation and delivery up of four promissory notes made by G. and S. jointly to B., and also for cancellation of an agreement in relation to which the notes were given; and B. afterwards sued G. and S. upon three of the four notes in question; and substantially the same issues were raised in

both actions, the making of the notes being admitted by G. and S. in the pleadings, the actions were consolidated, and G. was allowed to proceed with his action, S. being added as a party to it.

C. J Holman for Burke.

D. Armour for Girvin and Spence.

BOYD, C.] [Sept. 24.

BANK OF HAMILTON *v.* STARK.

Postponing trial—Terms of order—Securing debt—Rule 681.

In ordering the postponement of a trial the Master in Chambers has a discretion under Rule 681 to impose terms.

And where, upon the defendants' application to postpone the trial, the Master so ordered upon their giving security for part of the amount sued for,

Held, that the term was properly imposed.

W. M. Douglas for plaintiffs.

D. Henderson for defendants.

BOYD, C.] [Oct. 8.

In re DINGMAN AND HALL.

Leave to appeal—Report of referee—Time—Judgment on further directions, effect of—Jurisdiction of judge in chambers and in court.

Held, that after the report of a referee has become absolute and a judgment on further directions founded thereon has been pronounced, drawn up, and entered, a Judge in Chambers has no jurisdiction to entertain an application for leave to appeal; nor could any appeal be entertained unless the judgment on further directions were set aside; and that could not be done even by a Judge in Court, but only by the proper appellate tribunal.

Hoyles for Dingman.

Kilmer for Hall.

BOYD, C.] [Sept. 24.

LATOUR *v.* SMITH.

Costs—Taxation—Costs of unnecessary proceedings or witnesses—Discretion of taxing officer—Rules 1195, 1215—Costs of præcipe order.

By the judgment on further directions the plaintiffs were awarded the costs of the action and reference. Upon appeal from the taxation of such costs, the defendant contended that the plaintiffs should not be allowed the costs of attendances and witnesses in the Master's office relating to items in the account in question as to which the plaintiffs failed.

Held, that the plaintiffs were entitled to all the costs properly, fairly, and reasonably incurred upon the reference, but not to costs of unnecessary proceedings or witnesses; and costs of witnesses called to establish something on which the party calling them failed, were in the discretion of the taxing officer.

Rules 1195 and 1215 considered.

Held, also, that upon taxation only one attendance should be allowed on obtaining a præcipe order.

Langton for plaintiffs.

Middleton for defendant.

BOYD, C.] [Oct. 1.

Re BAKER.

Solicitor and client—Taxation of bill of costs after payment, and death of solicitor—Delay in applying—Special circumstances—Terms.

A bill of costs rendered by a solicitor in October, 1888, was paid shortly afterwards, but upon the undertaking of the solicitor, contained in letters written by him, that the payment was to be subject to the taxation of the bill at any time. The solicitor died in May, 1889, and no application for taxation was made till the 2nd of September, when an *ex parte* order was obtained from the Master in Chambers for taxation, the letters of the solicitor not being produced nor any special circumstances shown. Upon the application of the executor of the solicitor to the Master to set aside his *ex parte* order the letters were produced.

Held, that the Master was not bound to vacate his first order, although it was wrong; but, there being no imputation of bad faith, was right in giving leave to amend the order so as to do substantial justice; and, notwithstanding the death of the solicitor after being paid, there was jurisdiction to order a taxation as against his representative, under the circumstances.

The application being within the year came under s. 46 of the Solicitor's Act, R.S.O., c. 147, and "special circumstances" to justify a taxation existed in the fact of the letters having been written by the solicitor; but the delay of the applicants and the death of the solicitor

were reasons for imposing terms; and it was ordered that upon the taxation the books of the solicitor should be *prima facie* evidence of the correctness of his charges; or if the books were not available that the bill should be so taxed as to throw the *onus* of impeaching any charges on the applicants.

George Bell for the executrix.

George Ritchie for the applicants.

BOYD, C.] [Oct. 2.

SANDERSON *v.* ASHFIELD.

Costs—Action for price of work—Inferiority of work—Not subject of set-off in counter-claim.

The plaintiff claimed $1,205, the balance of the contract price for work done, and the defendant claimed that by reason of imperfect work the balance should be reduced by $900. The defendant was allowed $266.54 in respect of his claim for reduction, and the plaintiff therefore recovered $938.46.

Held, that what the defendant claimed was neither a set-off nor a counter-claim; and as the plaintiff had substantially succeeded he should get the general costs of the action and reference, less the costs incurred by the defendant in establishing the items of improper work in which he succeeded.

Cutler v. *Morse*, 12 P.R. 594, followed.

John Greer for the plaintiff.

Walter Read for the defendant.

Miscellaneous.

OSGOODE HALL LIBRARY.

Latest additions.

Abbott's Trial Brief in Criminal Cases, New York, 1889.

Allan's Law of Good-will, London, 1889.

Baker's War with Crime, London, 1889.

Bell's Principles of the Law of Scotland, 9th ed., 2 vols., Edinburgh, 1889.

Bourinot's Constitution of Canada, Montreal 1888.

Bradlaugh's Rules House of Commons, London, 1889.

Butterworth's Railway and Canal Traffic, London, 1889.

Butterworth s Railway and Canal Commission, London, 1889.

Chambers' Public Libraries, 3rd ed., London, 1889.

Clode's Law of Tenement Houses and Flats, London, 1889.

Drummond & Smith's Judicature Acts (Ireland), Dublin, 1889.

Endlich & Richards' Rights and Liabilities of Married Women, Philadelphia, 1889.

George's Mississippi Digest, 1818-70, Philadelphia, 1872.

Hageman on Privileged Communications, Princeton, 1889.

Hampden (Rev. Dr.) Jebb's Report of Case, London, 1849.

Heidelberg's Mississippi Digest, vols. 45-64, Albany, 1888.

Howell & Downey's Maritime Court Rules, Toronto, 1889.

Journal du droit International Prive, Tome 15, Paris, 1888.

Kelleher's Savigny on Possession in Civil Law, Calcutta, 1888.

Kelleher's Specific Performance and Mistake, Calcutta, 1888.

Kent's Commentaries on American Law, Philadelphia, 1889.

Kerr—The Student's Blackstone, 10th ed., London, 1887.

Law Reports, Consolidated Digest 1886-8, London, 1889.

Lawson's Law of Patents, 2nd ed., London, 1889.

Lindley's Law of Companies, 5th ed., London, 1889.

Lyon's Medical Jurisprudence, Calcutta, 1889.

Maine's International Law, London, 1889.

Manual of Military Law, London, 1887.

Maudsley on Mental Responsibility, 4th ed., London, 1885.

Megone's Companies Acts Reports, vol. 1, parts 1-5, London, 1888-9.

Morgan on House-owners, Holders, and Lodgers, London, 1889.

Nelson's Private International Law, London, 1889.

Powell's Law of Printers and Publishers, London, 1889.

Powis' Sinking Fund and Instalment Tables, Toronto, 1889.

Prideaux's Conveyancing, 14th ed., 2 vols., London, 1889.

Rentoul on Abortion, Edinburgh, 1889.

Robinson's Reminiscences, Bench and Bar, London, 1889.

Saunders' Precedents of Indictments, 2nd ed., London, 1889.

Scottish Law List, Edinburgh, 1889.

Selden Society Publications, vol. 2, London, 1889.

Smith's Master and Servant, London, 1889.

Speeches of H.R.H. Prince of Wales, 1863-88, London, 1889.

Stewart's Law of Wills, London, 1889.

Thring on Joint Stock Companies, 5th edition, London, 1889.

Webster's Conditions of Sale, London, 1880.

Westlake's Private International Law, London, 1889.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for the weeks ending October 5th and 12th have the following contents: Italy Drifting, by the Marchese Alfieri de Sostegno, *Nineteenth Century;* Russian Characteristics, *Fortnightly Review;* Wordsworth and the Quantock Hills, *National Review;* Elephant-Kraals, *Murray's Magazine;* Spanish and P rtuguese Bull-Fighting, *Fortnightly;* The Court of Vienna in the Eighteenth Century, *Temple Bar;* The Origin of Modern Occultism, *National Review;* Parallels to Irish Home Rule, by Edward A. Freeman, *Fortnightly;* Eucalyptus, Pine, and Camphor Forests, *Gentleman's Magazine;* Lepers at the Cape: Wanted, a Father Damien, *Blackwood's Magazine;* A Real Working Man, *Macmillan's Magazine;* vers" and "The Minister of Kindrach," and poetry and miscellany.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price ($8) is low; while for $10.50 the publishers offer to send any one of the American $4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.

TRINITY TERM, 1889.

The following gentlemen were called to the Bar during the above term, viz.:

Sept. 2nd.—John Garner Kerr, with honours and silver medal; James Ross, with honours and bronze medal; George Ross and Walter Scott MacBrayne, with honours; and James McCullough, Alfred Edmund Lussier, George William Bruce, Frederick McBain Young, John Wesley Roswell, John Howard Hunter, John Gordon Gauld, Angus MacNish, George Frederick Henderson, Horace Bruce Smith, George Luther Lennox, Herbert Holman, Joseph Frederic Woodworth, Henry Warrington Church, Alexander Stuart, Charles Daniel Macaulay, William Woodburn Osborne, Daniel Sharp Kendall, Frank Sangster, Harry Herbert Johnston, Owen Ritchie, Robert McDowall Thomson, Frederick Rohleder, John William Seymour Corley, Andrew Elliott, Francis James Roche.

Sept. 3rd.—Walter Dymond Gregory.

Sept. 13th.—Magloire Routhier.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz.:

Sept. 2nd.—J. G. Kerr, A. E. Lussier, G. Ross, F. Reid, C. D. Macaulay, J. G. Gauld, J. F. Woodworth, T. Graham, W. W. Osborne, T. A. Rowan, D. S. Kendall, H. Miller.

Sept. 3rd.—F. H. Keefer, G. N. Beaumont, J. A. Chisholm, J. Ross, H. Holman, J. W. S. Corley, H. H. Johnston, D. M. Robertson, J. W. Roswell, F. M. Young, G. W. Bruce.

Sept. 7th.—O. Ritchie, J. A. Ritchie.

Sept. 13th.—A. W. A. Finlay.

The following gentlemen passed the Second Intermediate Examination, viz.:

E. B. Ryckman, with honours and 1st scholarship; W. Wright, with honours and 2nd scholarship; D. A. McKillop, with honours and 3rd scholarship: A. G. Mackay and W. H. Nesbit, with honours; F. Pedley, R. C. Gillett, W. G. Richards, H. L. Drayton, R.M. Graham, D. O'Brien, S. E. Lindsey, H. J. Minnhinnick, W. E. L. Hunter, A. Crozier, J. P. Dunlop, J. A. Ferguson, W. McBrady, G. S. Kerr, J. H. McGhie, F. B. Mosure, T. A. Beament, A. C. Boyce, J. J. Hughes, J. H. Cooper, W. J. Kidd, E. M. McIntyre, H. L. Puxley, W. H. Kennedy, M. R. Allison, H. Carpenter, J. J. Drew, W. L. Morton, C. Murphy, and J. McKean.

The following gentlemen passed the First Intermediate Examination, viz.:

T. C. Thomson, with honours and 1st scholarship; A. T. Hunter, with honours and 2nd scholarship; W. E. Gundy, with honours and 3rd scholarship; J. G. Harkness, C. L. Crassweller, T. M. Higgins, B. S. Lefroy, G. Wilkie, W. F. Robinson, N. P. Buckingham, and H.D. Leask, with honours; W. T. Elliott, E. Pirie, C. F. Gilchriese, L. G. McCarthy, J. B. Ferguson, W. A. Cameron, J. A. Harvey, W. A. Baird, H. F. McLeod, G. H. D. Perryn, W. H. P. Walker, N. Kent, S. S. Reveler, J. Lennon, J. Kerr, T. L. W. Porte, J. O. Dromgole, G. R. Sweeny, C. Pierson, and W. M. Shaw.

The following gentlemen were entered on the books of the Society as Students-at-law, viz.:

Graduates.—Francis King, Percy Mahood, George Edward Jefferson Brown, Walter McClennan Allen, Edward Washington Drew, Robert James Gibson, John Henry Henderson, John Strachan Johnston, D'Arcy Richard Charles Martin, James Henry MacGill, Fletcher C—— Snider, John Donald Swanson.

Matriculants.—Benjamin Morton Jones, John Gilmour Hay, Alfred Erskine Hoskin, George Just Reiner, Henry Campbell Small.

Junior Class.— Charles Merritt Marshall, George Hamilton Pettit, William Thomas Henderson, Walter Gow, William Norman Tilly, Ralph John Slattery, Henry Joseph Patterson, John Pierce Stanton, Corsellis Hodge, William Farquhar Gurd, Alphonso Macfarlane, David Elroy Smith, Edward Chanay Attrill, William Duncan Moss, Evan Stevenson, James F——, J—— Cashman, William Alexander Douglas Grant, James White Graham, John Robert Logan, Samuel James Cooley, Norman St. Clair Gurd, Covert Emerson Jarvis.

Articled Clerks.—Thomas Kingston Allan, James Gilchrist Burnham.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School, Osgoode Hall, Toronto.

Those Students-at-Law and Articled Clerks, who under the Rules are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be the most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers, E. D. ARMOUR. A. H. MARSH, LL.B.

Examiners, R. E. KINGSFORD, LL.B. P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the Rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1860, fourteen Scholarships in all will be offered for competition, seven of those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students.

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School:

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hiliary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum:

CURRICULUM.

FIRST YEAR.

Contracts.

Smith on Contracts.

Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.

Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the after-

noon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's principles of Equity.

Evidence.

Powell on evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 n the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's construction and effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Oourts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

CURRICULUM OF THE LAW SOCIETY OF UPPER CANADA.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with clause three of this Curriculum, and presenting to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present a Certificate of having passed, within four years of his application, an examination in the sub-

jects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be), on conforming with clause three of this Curriculum, without any further examination by the Society.

3. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, on or before the fourth Monday before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher and pay $1 fee; and on or before the day of presentation file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

4. The Law Society Terms are as follows:—

Hiliary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, second Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

5. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday of June of the same year.

6. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

7. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

8. Service under Articles is effectual only after the Primary Examination has been passed.

9. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

10. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

11. Candidates for call to the Bar must give notice signed by a Bencher, on or before the fourth Monday before Term. Candidates for Certificates of Fitness are not required to give such notice.

12. Candidates for Call or Certificate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

13. No information can be given as to marks obtained at Examinations.

14. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

15. All notices may be extended once, if request is received prior to day of Examination.

16. Questions put to Candidates at previous Examinations are not issued.

FEES.

Notice Fee	$ 1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM for 1889.

Students-at-Law.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil Æneid, B. V.
- Cæsar, B. G. b, I. (1-33.)

1890. Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical reading of a selected Poem:

1889—Scott, Lay of the Last Minstrel.

1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.

Translation from English into French Prose.

1888 / 1889 } Souvestre, Un Philosophe sous le toits.

1889—Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the year 1889, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.

Euclid Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors, in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 123, Revised Statutes of Ontario, 1887, and amending Acts.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act; R.S.O., 1887, cap. 44, the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110, 143.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

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A LUDICROUS result seems to have been reached in *Anderson* v. *Morden*, a case lately before the Court of Appeal. The action was for the administration of an estate and the construction of a will. This will was a peculiar one, the testator not contemplating the possibility of his widow outliving his grandchildren. The Court of Appeal was evenly divided, two of the Judges holding that the estate had vested in the grandchildren, and two of them holding that there was an intestacy. The judgment of the court below was that the estate did not vest, but the question of intestacy was not argued or considered in that court. All the Judges of the Court of Appeal agreed that the judgment in the court below was wrong, but as they themselves could not agree upon the judgment to be given, the appeal was dismissed, and the judgment which every Judge of the Court of Appeal believed to be erroneous, stands as the decision in the case.

FEDERAL GOVERNMENT IN CANADA.

The publication of Mr. Bourinot's lectures upon "Federal Government in Canada," at the Johns Hopkins University, gives to the public a clear, concise and very readable summary of the constitutional history of Canada, and of the form of government now established throughout the Dominion. These lectures, which were intended for the information of persons knowing but little of our history or constitution, contain a good deal that is, or should be, familiar to every Canadian; they are valuable, nevertheless, as a means of instruction for those who are ignorant of the past and present condition of our affairs, and for reference by those who have been better instructed. The lectures are four in number. The first gives an historical outline of our political development; the second treats of the general features of the Federal system under which we are governed; the third enters in detail into the special relations which exist, under the British Parliamentary system, between the administration and the Parliament; and the fourth deals with the government and legislatures of the Provinces composing the Confederation.

The first lecture begins by describing the condition of the early settlements in New France prior to the conquest; he then refers to the second period in our history, lasting from the conquest to the passage of the Constitutional Act of

1791, during which, amid much discontent and many difficulties, the foundation of our present system was being established; the third period, ending with the Act of 1841, saw the development of Responsible Government and the union of the Provinces; the fourth brings our history down to the establishment of confederation in 1867; the result of the many years of political agitation through which Canada has passed being, according to Mr. Bourinot, that "no country in the world enjoys a larger measure of political liberty or greater opportunities for happiness and prosperity under the liberal system of government which has been won by the sagacity and patience of her people." So it might be, and so we would it were, but recent events have led us to think that, while we have been complacently admiring the political structure so pleasingly described, certain persons within it, taking advantage of the shelter it gives, have been secretly possessing themselves of such coigns of vantage as enable them to usurp entire control in defiance of the rules laid down for its management. In place of religious freedom we see one ecclesiastical system dominating over all others, interfering in public affairs, and subserviently obeyed by contending factions. In place of political equality we see privileges allowed to some and denied to others as party interests seem to require. We see a Society, semi-political, semi-religious, incorporated, endowed, and legally recognized, the very existence of which is a menace to civil and religious liberty. And lastly, we see the great power of disallowance, vested in the supreme government for the protection of minorities, the restraint of aggressive majorities, and the negation of any Provincial legislation that may injuriously affect the public weal, used or withheld simply as a weapon of party warfare.

We boast of our freedom from interference or oppression on the part of any tyrant, foreign or domestic, while we allow the despotism of party spirit so to stifle individual independence of thought and action as to make us an easy prey to any unscrupulous faction, which, holding the balance of power, can compel either party in turn to obey its behests, and serve its interests in defiance of the "vital principles of political freedom and religious toleration" which we are assured we so largely enjoy.

Mr. Bourinot explains very clearly the rules that should govern the several jurisdictions of the Imperial, the Dominion, and the Provincial Governments, in their relations to each other, and to their own internal affairs, especially in those complex matters where concurrent powers exist, or the line which divides them is so finely drawn as to be hardly discernible. As regards the power of disallowance, with which he deals very cautiously, the lecturer evidently leans to the opinion that it would be more safely vested in a judicial than in an executive body, though clearly were such a solution of the difficulty adopted, and the only question to be considered was whether the passing of a Provincial law was within the power granted by the British North America Act, the power to contravene legal but injurious legislation would cease to exist, and the confederation become a mere alliance of sovereign States. This has been clearly brought out in the recent discussions on the Jesuits' Estates Bill, to which Mr. Bourinot refers in a note, and in nothing have party leaders so decidedly shown their desire to keep

on good terms with the hierarchy than in the recent avowals, altogether inconsistent with the practice of past years, that the exercise of the power of veto is dependent upon the object being within or without the power of the Legislature.

The British North America Act clearly intended the power of disallowance to be exercised, as it has hitherto been exercised by both parties, in cases where the Provincial legislation was *intra vires* of the Legislature, but, for some reason or other, contrary to the general policy, or injurious to the general interests, of the Dominion. That it was so meant to be used is clear, not only from the terms of the Act, but from the recorded opinions of leading men who took part in the framing of our constitution. Sir George Cartier had it in view in the interests of his own church and race, whose representatives would be the first to demand its exercise were those interests assailed in any of the Provinces. It suits them to stand up for the doctrine of Provincial rights when the legislation of Quebec is found fault with. They would like to have that doctrine stretched to the utmost, that they might pursue unchecked their scheme of creating or fostering a purely French Canadian nationality, and, in furtherance of that object, maintaining and extending in every possible way the influence and power of the Roman Catholic ecclesiastical system. But there is no doubt that the power of disallowance would be invoked by them should their interests be affected by Provincial legislation outside of Quebec. Apart, however, from any special application, the doctrine of Provincial rights, as expounded by Mr. Mills, and as evidently favoured by Mr. Bourinot, would bring about in the confederation the same results which the doctrine of State rights brought about in the United States—results which the authors of confederation in British North America clearly foresaw and were careful to avert. The Dominion Government hold this power, as they hold all other powers, by virtue of their responsibility to Parliament, and Parliament, representing all parts of the Dominion, will see that this power is exercised only when the general interests require that it should be exercised, not for party purposes, or to gain a party triumph, but for the public good. Parliament, on the other hand, is equally bound to see that it is not put in force for any unworthy object—to thwart any Province in the reasonable use of its legitimate powers, or from caprice, or a desire to injure political opponents. And neither Government nor Parliament can rid themselves of this power or this responsibility, simply because the majority feel at any time that its due exercise will involve them in difficulty, or be injurious to the interests of a party. The risk to confederation from too hasty or too frequent use of the power of disallowance is slight as compared with the certain danger that would arise from its being set aside altogether, as it virtually would be were the extreme theory of Provincial rights to prevail, or the power to be vested altogether in a judicial rather than an executive body.

In the fourth lecture, which deals with the Provincial Governments and Legislatures, Mr. Bourinot gives a very interesting sketch of the different Provinces, their Legislatures, municipal institutions, judiciary, etc.; and, in the concluding reference to the racial and religious difficulties which lie in the path of unity and progress, he expresses the opinion, in which we may all heartily con-

cur, that by "mutual compromises and mutual forbearance" great possibilities are open to us. All we stipulate for is that the compromises and forbearances shall be mutual, and that all rights and privileges shall be equally enjoyed.

W. E. O'BRIEN.

COMMENTS ON CURRENT ENGLISH DECISIONS.

The Law Reports for September comprise 23 Q.B.D., pp.261-372 and 42 Chy.D., pp.1-92.

MALICIOUS PROSECUTION—ISSUE OF WARRANT—JUDICIAL ACT.

In *Lea* v. *Charrington*, 23 Q.B.D., 272, which we noted, *ante* p. 425, when the case was before the Divisional Court, the judgment of the latter Court was affirmed by the Court of Appeal (Lord Esher, M.R., Cotton and Lindley, L.JJ.) who, without deciding whether the case of *Hope* v. *Evered*, 17 Q.B.D., 338, on which the Court below had proceeded, applied, were of opinion that there was on the facts proved at the trial, no evidence to go to the jury of want of reasonable and probable cause.

PRACTICE—DISCOVERY——AFFIDAVIT OF PARTY AS TO DOCUMENTS CONCLUSIVE.

In *Morris* v. *Edwards*, 23 Q.B.D., 287, a point of practice is discussed by the Court of Appeal (Lord Esher, M.R., and Cotton and Lindley, L.JJ.) The action was for recovery of land, and the defendant had filed an affidavit on production of documents in which he stated that he had in his possession a bundle of documents marked with the letter A, which he objected to produce, on the ground that they related solely to his own title, and did not in any way tend to prove or support the plaintiffs' title. The plaintiffs then administered an interrogatory, asking whether such documents did not include a particular document mentioned and relied on in the plaintiffs' statement of claim. This interrogatory the defendant refused to answer, whereupon the plaintiffs' applied for an order to compel the defendant to answer it, and on the application sought to read an affidavit in contradiction of the affidavit of documents. The Divisional Court (Denman and Charles, JJ.) made the order, but it was held by the Court of Appeal that the latter affidavit was inadmissible, and that the plaintiffs were not entitled to an answer to the interrogatory, and the order of the Divisional Court was therefore reversed. Their Lordships in appeal reiterate the rule laid down in *Jones* v. *Monte Video Gas Co.*, 5 Q.B.D., 556, that it is only when it appears from the affidavit of documents itself, or from the documents referred to therein, or from an admission in the pleadings of the party from whom the discovery is sought, that the affidavit is insufficient, that an order for a further affidavit can be properly made. The insufficiency cannot be made out by a contentious affidavit.

ACTION AGAINST PUBLIC BODY—NOTICE OF ACTION—JURISDICTION—DAMAGES AWARDED IN LIEU OF AN INJUNCTION, EFFECT OF—(R.S.O., c. 44, s.53, s-s. 9.)

In *Chapman* v. *Auckland*, 23 Q.B.D., 94, the Court of Appeal have carried the previous decisions one step further in regard to the circumstances under which a notice of action against a public body may be dispensed with. In the previous case of *Flower* v. *Leyton*, 5 Chy.D., 347, it had been held that where damages were claimed as auxiliary to the plaintiff's claim for an injunction, no notice of action was necessary. In the present case (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) held that when the plaintiff brings his action *bona fide* for an injunction, but at the trial the Court, under Lord Cairns' Act (see R.S.O., c. 44, s. 53, s-s. 9), awards damages instead of an injunction, still no notice of action is necessary.

HABEAS CORPUS—RETURN—DELIVERY OF PERSON OF INFANT BY DEFENDANT TO A THIRD PERSON, AFTER LAWFUL DEMAND, BUT BEFORE WRIT—CONTEMPT—ATTACHMENT—"CRIMINAL CAUSE OR MATTER."

In the *Queen* v. *Bernardo*, 23 Q.B.D., 305, an application was made to quash a return to a *habeas corpus* issued at the suit of the plaintiff, the parent of a child, against a well-known philanthrophist to whom the child had previously been delivered by its mother. Prior to the application for the writ a demand had been made on the defendant for the delivery up of the child, which he refused to comply with, and had, instead, handed the child over to a French lady, who had removed it to France with a view to conveying it to Canada. After this the writ issued, and the defendant set up the above facts as an excuse for not delivering up the child. But Matthew and Grantham, JJ., quashed the return, and their decision was affirmed by the Court of Appeal (Lord Esher, M.R., and Cotton and Lindley, L.JJ.) On the hearing of the appeal a preliminary objection was taken that no appeal would lie because the proceeding was "a criminal cause or matter," but this objection was overruled. Lord Esher, M.R., says regarding the merits at p. 312, "The question of law is in substance whether a person who is bound to bring a child before the court can say by way of excuse, 'I have wrongfully given up the child to some one else.' In my opinion that is no valid excuse for not obeying the writ. Whether the person to whom he has handed over the child is within the jurisdiction or not, he must take the consequences, for it was his wrongful act which prevents him from obeying the writ."

HUSBAND AND WIFE—ANTE NUPTIAL DEBT OF WIFE—JUDGMENT AGAINST WIFE, WHETHER BAR TO ACTION AGAINST HUSBAND—STATUTE OF LIMITATIONS.

The case of *Beck* v. *Pierce*, 23 Q.B.D., 316, is another contribution to the law relating to married women. An action had been brought and judgment recovered against a married woman for an *ante* nuptial debt. This judgment being unsatisfied because there was no separate estate of the married woman out of which it could be realized, a second action was brought against her husband, who had acquired property from his wife exceeding the amount of the debt. It was contended that the previous judgment against the wife was a bar to the present

action, but the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) overruling Grantham, J., held that it was no bar. This case also decides that the husband cannot be made liable for *ante* nuptial debt of his wife which accrued against the wife more than six years before the commencement of the action, and a judgment recovered against the wife does not affect the husband so as to prolong the period of limitation.

PRACTICE—PRODUCTION OF DOCUMENTS—PRIVILEGED COMMUNICATIONS.

Lowden v. *Blakey*, 23 Q.B.D., 332, is a decision of Denman and Charles, JJ., upon a question of practice. The defendant in the action had been a successful plaintiff in a prior action to restrain an infringement of his trade mark, and at the conclusion of the action he drafted an advertisement of the proceedings for publication in a trade journal; before publication the draft was submitted to counsel, and, as settled by him, was published. One of the defendants in the prior action brought the present action for an alleged libel in the advertisement so published, and he claimed the right to inspect the draft advertisement settled by counsel. But the Court considered that on the authority of *Minet* v. *Morgan*, 8 Chy., 361, the document was privileged from production as being a confidential communication to counsel.

PRACTICE—COSTS—JURISDICTION OF JUDGE TO DEPRIVE SUCCESSFUL PLAINTIFF OF COSTS—"GOOD CAUSE"—LETTERS WRITTEN "WITHOUT PREJUDICE."

In *Walker* v. *Wilsher*, 23 Q.B.D., 335, a verdict was entered for the plaintiff by consent for £100. In disposing of the question of costs, Huddleston, B., took into account letters and conversations which had passed between the parties "without prejudice." This the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) held that he should not have done, and that they could not constitute "good cause" for depriving the plaintiff of costs.

PRACTICE—THIRD PARTY NOTICE—SERVICE OUT OF JURISDICTION—ORD. XVI. R. 48—(ONT. RULE 329.)

In *Dubout* v. *Macpherson*, 23 Q.B.D., 340, A. L. Smith, J., decided that where an action is brought for a breach within the jurisdiction of a contract which, according to the terms of it, ought to be performed within the jurisdiction, and the defendant claims indemnity from a third party, the Court may allow service of notice of such claim on the third party out of the jurisdiction.

INSURANCE (MARINE)—IMPROPER NAVIGATION.

In *Canada Shipping Co.* v. *British Shipowners Mutual Protection Association*, 23 Q.B.D., 342, the Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.) unanimously affirmed the judgment of Charles, J. (22 Q.B.D., 727), which we noted *ante* p. 361.

BILLS OF EXCHANGE—FRAUD IN NEGOTIATION—EVIDENCE—ONUS OF PROOF—BILLS OF EXCHANGE ACT, 1882, (45 & 46 VICT., C. 61), S. 30, S-S. 2.

Tatam v. *Haslar*, 23 Q.B.D., 345, is a decision under the Bills of Exchange Act, s. 30, s-s. 2, which was doubtless intended to be declaratory of the law as it previously existed, and which provides that "every holder of a bill is deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that subsequent to the alleged fraud or illegality value has in good faith been given for the bill." In this case the question arose, fraud being proved, whether the plaintiff had sufficiently discharged the onus that lay on him by merely showing that he had paid value, without also proceeding to show that he had acted *bona fide* and without notice of the fraud. Denman and Charles, JJ. (reversing Field, J.), were of opinion that the plaintiff did not comply with the statute by merely proving that he had given value, because the statute requires him to show not only that, but also that it has been given "in good faith."

PRACTICE—DISCONTINUANCE OF ACTION—ORD. XXVI., R. 1—(ONT. RULE 641.)

Spincer v. *Watts*, 23 Q.B.D., 350, is a decision of the Court of Appeal (Lindley and Lopes, L.JJ.,) on the construction of the Rule from which Ont. Rule 641 is taken. The action was by the holder against the drawer and acceptor of a bill of exchange. The acceptor paid money into court in satisfaction of the claim, while the drawer delivered a defence denying liability, and set up a counter claim. The plaintiff then paid into court the amount of the counter claim and took out of court the amount paid in by the acceptor, and then gave notice of discontinuance; and the question was, whether the notice of discontinuance had been delivered after defence "before taking any other proceeding in the action." The Court of Appeal (overruling Pollock, B., and Manisty and Mathew, JJ.) held that it had. As the Lords Justices explain the Rule it means that the notice must be given "before taking any proceeding with a view to continuing the action against a person served with the notice of discontinuance."

CRIMINAL LAW—FALSE PRETENCES—OBTAINING VALUABLE SECURITY ON REPRESENTATION THAT ADVANCE WOULD BE MADE—24 & 25 VICT., C. 96, S. 90—(R.S.C., C. 164, S. 78).

In the *Queen* v. *Gordon*, 23 Q.B.D., 354, the prisoner was convicted on an indictment charging that by the false pretence to the prosecutors that he was "prepared to pay them or one of them" £100, he did then unlawfully and fraudulently induce the prosecutors to "make a certain valuable security," to wit, a promissory note for £100, with intent thereby to defraud them. The prisoner, it appeared, was a money lender, and had promised to make an advance of £100 to the prosecutors on the security of their stock. At the time fixed for the completion of the transaction, the prisoner took from the prosecutors an acknowledgment of the receipt of £60, and an agreement to pay back £100,

£40 being for interest, and also a promissory note for the £100, payable by instalments. These documents were not read over to the prosecutors, and when they received the £60 they expostulated with the prisoner that it was not what they were to receive, and subsequently tendered back the money, which the prisoner refused to take. The Court of Criminal Appeal (Lord Coleridge, C.J., Matthew, Cave, Wills, and Grantham, JJ.) were unanimously of opinion that the prisoner was rightly convicted, and that his representation that he was prepared to advance the £100 was a false pretence of an existing fact.

COMPANY—DIRECTOR—GIFT BY PROMOTER—CONTRACT PENDING BETWEEN COMPANY AND PROMOTER—FIDUCIARY POSITION OF DIRECTOR—EXTENT OF LIABILITY.

Eden v. *Ridsdales' Ry. Lamp & Lighting Co.*, 23 Q.B.D., 368, was an action by a director of a company to recover fees alleged to be due to him as a director of the defendant company, in which the company not only denied liability for the claim of the plaintiff, but claimed by way of counter claim from the plaintiff an account of 200 shares of the company which had been given to him by a promoter of the company, whilst there were questions open between the company and the promoter. Grantham, J., decided in favour of the plaintiff upon both claim and counter claim; but the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) reversed his decision as regarded the counter claim, and held that the company was entitled either to claim the thing given, or its highest value whilst held by the director.

COMPANY—WINDING UP—CONTRIBUTORY SHARES—ISSUE AT DISCOUNT.

In re Licensed Victuallers' Mutual Trading Association, 42 Chy.D., 1, was an appeal by a person placed upon the list of contributories of a company in course of being wound up. After the formation of the company and before its shares had been fully offered to the public, the appellant, a stock broker, who traded under the name of Holloway & Co., by letter agreed with an agent of the company to "underwrite" 10,000 shares "at 15 per cent. discount," and "to pay the application money upon any balance of shares required to make up the 10,000." In pursuance of this agreement, and without any further application by the appellant, 8,555 shares were allotted to him. He returned the allotment notice, and wrote declining to take the shares. The company shortly afterwards went into liquidation, and the liquidator entered the name of the appellant on the list of contributories. Chitty, J., was of opinion that the appellant was properly chargeable as a contributory, but that the agreement to issue the shares at a discount was *ultra vires* of the company. On the appeal to the Court of Appeal (Cotton, Lindley, and Bowen, L.JJ.), that Court required expert evidence to be given to explain the meaning of the expression "underwriting" as applied to shares in a public company. According to this evidence, it appeared that before the issue of a company's shares to the public, persons who were willing for a consideration to guarantee the subscription to the stock would by contract in writing agree with the company for a specified commission, that in the event

of the whole issue not being subscribed for by the public, they would take an allotment of the remainder in proportion to the amount specified in the agreement, and that this was what was meant by "underwriting." On this evidence the Court of Appeal held that the agreement must be treated not merely as a guarantee, but as an application for an allotment of so many of the 10,000 shares as should not be applied for by the public, and that this agreement authorized the secretary to issue the allotment to the appellant. They, however, differed with Chitty, J., as to the meaning of the word "discount" in the agreement, and held that it must be construed as "commission." So that the agreement was not one to issue shares at a discount and was therefore valid.

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

TRINITY TERM, 1889.

The following gentlemen were called to the Bar during the above term, viz.:

September 2nd.—John Garner Kerr, with honours, and silver medal, James Ross, with honours, and bronze medal, George Ross, and Walter Scott MacBrayne, with honours, James McCullough, Alfred Edmund Lussier, George William Bruce, Frederick MacBain Young, John Wesley Roswell, John Howard Hunter, John Gordon Gauld, Angus MacNish, George Frederick Henderson, Horace Bruce Smith, George Luther Lennox, Herbert Holman, Joseph Frederic Woodworth, Henry Warrington Church, Alexander Stuart, Charles Daniel Macaulay, William Woodburn Osborne, Daniel Sharp Kendall, Frank Sangster, Henry Herbert Johnston, Owen Ritchie, Robert McDowall Thomson, Frederick Rohleder, John William Seymour Corley, Andrew Elliot, Francis James Roche.

September 3rd.—Walter Dymond Gregory.

September 13th.—Magloire Routhier.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz.:—

September 2nd.—J. G. Kerr, A. E. Lussier, G. Ross, F. Reid, C. D. Macaulay, J. G. Gauld, J. F. Woodworth, T. Graham, W. W. Osborne, T. A. Rowan, D. S. Kendall, H. Miller.

September 3rd.—F. H. Keefer, G. N. Beaumont, J. A. Chisholm, J. Ross, H. Holman, J. W. S. Corly, H. H. Johnston, D. M. Robertson, J. W. Roswell, F. M. Young, G. W. Bruce.

September 7th.—O. Ritchie, J. A. Ritchie.

September 13th.—A. W. A. Finlay.

The following gentlemen passed the Second Intermediate Examination, viz.:

E. B. Ryckman, with honours, 1st scholarship, W. Wright, with honours, 2nd scholarship, D. A. McKillop, with honours, 3rd scholarship, A. G. Mackay,

and W. H. Nesbit, with honours, F. Pedley, R. C. Gillet, W. G. Richards, H. L. Drayton, R. M. Graham, D. O'Brien, S. E. Lindsey, H. J. Minhinnick, W. E. L. Hunter, A. Crozier, J. P. Dunlop, J. A. Ferguson, W. McBrady, G. S. Kerr, J. H. McGhie, F. B. Mosure, T. A. Beament, A. C. Boyce, J. J. Hughes, J. H. Cooper, W. J. Kidd, E. M. McIntyre, H. L. Puxley, W. H. Kennedy, M. R. Allison, H. Carpenter, J. J. Drew, W. L. Morton, C. Murphy, and J. McKean.

The following gentlemen passed the First Intermediate Examination, viz.:—

T. C. Thomson, with honours, 1st scholarship, A. T. Hunter with honours, 2nd scholarship; W. E. Gundy, with honours, 3rd scholarship; J. G. Harkness, C. L. Crasweller, T. M. Higgins, B. S. Lefroy, G. Wilkie, W. F. Robinson, N. P. Buckingham, and H. D. Leask with honours; W. T. Elliott, E. Pirie, C. F. Gilchriese, L. G. McCarthy, J. B. Ferguson, W. A. Cameron, J. A. Harvey, W. A. Baird, H. F. MacLeod, G. H. D. Perryn, W. H. P. Walker, N. Kent, S. S. Reveler, J. Lennon, J. Kerr, T. L. W. Porte, J.O. Dromgole, G. R. Sweeny, C. Pierson, and W. M. Shaw.

The following gentlemen were entered on the books of the Society as Students-at-Law, viz.:—

Graduates—Francis King, Percy Mahood, George Edward Jefferson Brown, Walter McClellan Allen, Ed. Washington Drew, Robert James Gibson, John Henry Henderson, John Strachan Johnston, D'Arcy Richard Charles Martin, Jas. Henry MacGill, Fletcher Cameron, Snider, John Donald Swanson.

Matriculants—Benj. Morton Jones, John Gilmour Hay, Alf. Erskine Hoskin, Geo. Just Reiner, Henry Campbell Small.

Juniors—Chas. Merritt Marshall, Geo. Hamilton Pettit, Wm. Thomas Henderson, Walter Gow, Wm. Norman Tilley, Ralph John Slattery, Henry Joseph Patterson, John Pierce Stanton, Corsellis Hodge, Wm. Farquhar Gurd, Alphonso McFarlane, David Elroy Smith, Ed. Chanay Attrill, Wm. Duncan Moss, Evan Stevenson, James Cashman, William Alexander Douglas Grant, James White Graham, John Robert Logan, Samuel James Cooley. Norman St. Clair Gurd, Covert Emerson Jarvis.

Articled Clerks.—Thos. Kingston Allan, Jas. Gilchrist Burnham.

The following is a *resume* of the proceedings of Convocation during Trinity Term.

MONDAY, September 2nd.

Convocation met.

Present—Messrs. Beaty, Irving, Mackelcan, Morris, Moss, Osler, and Shepley.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

The Report of the Legal Education Committee on the curriculum of the Law School was received, read, and ordered for consideration to-morrow.

Ordered that Messrs. Irving, Meredith, and Moss be a special committee to draft a resolution suitable for the occasion of the death of the Hon. T. B. Pardee, Q.C., and that the Committee be requested to report to Convocation on Saturday, the 7th of September.

Ordered that a call of the Bench be made for Friday, 13th September, next, for the purpose of electing a bencher in place of the late Hon. T. B. Pardee, Q.C.

The Principal of the Law School reported upon the extent of building accommodation required, in pursuance of the order of Convocation of the 8th of June last, requiring him to report.

The report was read, and ordered for consideration on Saturday, 7th inst.

A letter dated 21st of August, 1889, complaining of the conduct of a solicitor was referred to the Discipline Committee to report whether said complaint discloses a *prima facie* case.

A letter to the Law Society, dated 13th of August, 1889, was read, and the Secretary was directed to reply and state that Convocation can only entertain specific charges, and that Convocation fails to see that the complainant has made any specific charge against the solicitor charged.

The Committee to whom was referred the question of honours and medals reported as follows:

They find the following candidates, viz., Messrs. J. G. Kerr, J. Ross, G. Ross, and W. S. McBrayne, are entitled to be called with honours, and that Mr. Kerr is entitled to receive a silver medal, and Mr. James Ross is entitled to receive a bronze medal.

The Committee further find that none of the candidates above named passed both the Intermediate Examinations with honours, and therefore none were eligible for a gold medal.

All which is respectfully submitted.

(Signed) CHARLES MOSS.
B. B. OSLER.
GEO. F. SHEPLEY.

The report was adopted, and it was ordered accordingly.

The resignation of Mr. E. D. Armour, dated 22nd July, 1889, as examiner, was received and accepted.

The Library Improvement Committee reported as follows:

"That they have ordered the improvements now about to be completed to be made in the library during vacation under the supervision of the architect, and they ask that their action in the matter as an emergency may be confirmed by Convocation."

The report was adopted.

Ordered that the action of the Committee be confirmed.

TUESDAY, September 3rd.

Convocation met.

Present—Messrs. Beaty, Bruce, Cameron, Irving, Lash, Martin, Morris, Moss, and Shepley.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

Mr. Lash gave notice that he would, at the next meeting, move for leave to introduce a rule to amend Rule 167 of the Rules of the Society, by adding thereto the words, "and such term if duly attended shall be allowed as part of his term of attendance in chambers or service under articles, provided that he passes the examination prescribed for such term," or other words to that effect.

The report of the Legal Education Committee on the proposed curriculum was taken up, and on the motion of Mr. Moss, seconded by Mr. Lash, was adopted.

Ordered that a call of the Bench be made for Friday, 13th of September, for the purpose of appointing lecturers and examiners.

Ordered that the Secretary give the proper notice by advertisement of the intention of the Society to make these appointments.

Mr. Moss gave notice that on Saturday next he would move to increase the salaries of lecturers and examiners.

Mr. Martin gave notice that he would at next meeting introduce a rule to allow students or articled clerks now exempt from attendance at the Law School, the option of coming under the rules and taking the examinations prescribed for the school terms at the dates thereby fixed, instead of the examinations otherwise applicable to their cases.

Mr. Moss, on behalf of Mr. Martin and himself, who, with the Principal of the Law School, recently visited some of the law schools of the United States, suggested that it was desirable that certain acknowledgments of the attention paid them on their recent visit should be made by Convocation, and further suggested as follows:

That a copy of the R.S.O., 1887, a Dominion Law List, two copies of Read's Lives of the Judges, and two copies of Rules of the Society, be sent to H. Arnold, Esq., Harvard Law School.

That two copies of Read's Lives and two copies of the Rules be sent to E. H. Bennett, LL.D., Boston Law School.

That the same and a photograph of the Hall be sent to Hon. F. Wayland, LL.D., Yale Law School.

That a copy of Read's Lives and the Rules be sent to Prof. Geo. Chase, Columbia Law School.

Ordered accordingly.

The Special Committee appointed to deal with the report of the Examiners on the First and Second Intermediate Honour Examinations presented their report:

That T. C. Thomson, A. T. Hunter, W. E. Gundy, J. G. Harkness, C. L. Crassweller, T. M. Higgins, B. S. Lefroy, G. Wilkie, W. F. Robinson, N. P. Buckingham, and H. D. Leask are entitled to be passed with honours in the First Intermediate Examination, and that T. C. Thomson is entitled to the first scholarship of one hundred dollars, A. T. Hunter to the second scholarship of sixty dollars, and W. E. Gundy to the third scholarship of forty dollars.

That E. B. Ryckman, W. Wright, D. A. McKillop, A. G. Mackay, and W. H. Nesbit are entitled to be passed with honours in the Second Intermediate Examination, and that E. B. Ryckman is entitled to the first scholarship of one hundred dollars, W. Wright to the second scholarship of sixty dollars, and D. A. McKillop to the third scholarship of forty dollars.

(Signed) CHARLES MOSS.
A. BRUCE.
G. F. SHEPLEY.

The report was adopted and ordered accordingly.

Mr. Shepley gave notice for next meeting of Convocation of the introduction of a rule to make amendments to Rules 160 to 165 inclusive, to provide for

abolishing a distinction between country and town students to the disadvantage of country students.

SATURDAY, September 7th.

Convocation met.

Present—Messrs. Bell, Cameron, Foy, Irving, Lash, Mackelcan, Martin, Meredith, Moss, Murray, Osler, and Shepley.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

Ordered that the examiners who conducted the Trinity Term examinations be each paid one hundred and fifty dollars for the term's work.

The following resolution was unanimously adopted by Convocation:

"The Benchers of the Law Society present at this meeting of Convocation desire to express the general feeling of regret at the death in July last of the late Honourable Timothy Blair Pardee, a member of their body since Easter Term, 1871, and one of Her Majesty's Counsel.

"Mr. Pardee was called to the Bar of this Province in Hilary Term, 1861, and was continuously a member of the Legislative Assembly of Ontario from its first session in 1867 to the day of his death.

"From the year 1872 until he retired in the present year, on account of ill-health, he filled the office of Commissioner of Crown Lands for the Province of Ontario. In 1876 he was appointed Queen's Counsel for Ontario.

"Convocation orders that this record of his career and their loss be entered on the minutes of their proceedings, a copy of which, with the expression of their deep sympathy, they direct to be transmitted to his family."

A letter from the Solicitor of the Society was read, stating that in consequence of the appointment of Mr. W. A. Reeve, Q.C., as Principal of the Law School, he (Mr. Reeve) will be unable to hold the briefs in the cases of *Hands* v. *Law Society* and *Re McDougall and Law Society*.

Ordered that Mr. Marsh, already retained in the Hands case, be retained in the McDougall case.

The report of the Princ pal on the accommodation required for the Law School was considered, and it was referred to a Special Committee composed of the members of the Legal Education Committee and Messrs. Martin, Shepley, Irving, Murray, and Osler, to report as to temporary and permanent accommodation for the Law School, and also to report upon the propriety of erecting in connection therewith consultation chambers for the use of such members of the Society as may desire to rent such chambers, and that the Committee were also authorized to obtain the assistance of Mr. Storm, the architect.

Pursuant to notice the following rule was passed: That Rule number 51 be amended by substituting the words "be fifteen" for the words "not exceeding eight."

Ordered that in addition to the five hundred dollars to be paid the examiners under Rule 52, the examiners be each paid two hundred dollars for the year ending 1st of October, 1890, to cover the examination of students under Rule 171.

Mr. Shepley moved, pursuant to notice, seconded by Mr. Mackelcan, that the words following in Rule 161 be struck out, viz.: "In attendance or under service in Toronto."—*Carried*.

The notices of motion given at last meeting by Mr. Martin and Mr. Lash were ordered to stand for next meeting of Convocation.

A new advertisement was ordered to be published, stating that the Benchers in Convocation have fixed the salaries of the lecturers to be appointed next Friday, the 13th inst., at the rate of fifteen hundred dollars per annum each, and that the salaries of the examiners to be appointed will be five hundred dollars per annum each, and in addition the sum of two hundred dollars each for the year ending 1st of October, 1890, to cover the examination of students under Rule 171.

FRIDAY, September 13th.

Convocation met.

Present—Sir Alexander Campbell, Sir Adam Wilson, and Messrs. Beaty, S. H. Blake, Britton, Bruce, Cameron, Foy, Fraser, Guthrie, Hoskin, Irving, Lash, Morris, Moss, Murray, Purdom, Robinson, Shepley, and Smith.

In the absence of the Treasurer, Mr. Irving was appointed Chairman.

The minutes of last meeting were read and approved.

Convocation proceeded to the election of a Bencher in the place of the late Hon. T. B. Pardee.

Mr. Colin Macdougall, Q.C., of St. Thomas, was elected a Bencher.

Ordered that the appointment of lecturers and examiners be now proceeded with, the date of the commencement of their duties and emoluments to be settled by the Legal Education Committee.

Convocation then appointed Mr. A. H. Marsh and Mr. E. D. Armour, lecturers, and Mr. P. H. Drayton and Mr. R. E. Kingsford, examiners.

Ordered that it be referred to the Legal Education Committee to ascertain what modifications should be made in respect to the attendance of students at the Law School, and to report to an adjourned meeting of Convocation on Saturday, the 21st of September, at 11 a.m., of which special notice shall be given, specifying the object of the meeting.

Mr. Moss from the Special Committee to whom was referred the question on building accommodation for the Law School, presented their report.

They have conferred with Mr. Storm, the architect, who is to report with respect to a proposed addition to the building now known as the Old Boiler House, but in view of the probability of Convocation making further directions at its next meeting, the Committee deferred further action in the meantime.

Ordered that the report be taken into consideration at the special meeting of the 21st inst.

The notices of motion given by Messrs. Martin and Lash were ordered to stand for consideration at the adjourned meeting on the 21st of September.

SPECIAL MEETING.

(Subject to confirmation at next meeting of Convocation.)

SATURDAY, September 21st.

Convocation met.

Present—The Treasurer and Sir Adam Wilson, and Messrs. Britton, Bruce, Foy, Irving, Lash, Macdougall, Mackelcan, Martin, Meredith, Morris, Moss, Murray, Osler, and Robinson.

The minutes of last meeting were read and approved.

Mr. Moss, from the Legal Education Committee presented their report:

The Legal Education Committee beg to report as follows:

They have, as directed by Convocation, considered the question of modifications to be made to the rules in respect of the attendance of students at the Law School, and they recommend the following, viz.:—

Students-at-law and articled clerks in attendance or under service in Toronto, who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, shall attend the Term of the School for 1889-1890, and the examination at the close thereof, if passed by such students or clerks, shall be allowed to them in lieu of their First or Second Intermediate Examinations, as the case may be.

The Legal Education Committee may, under special circumstances, relieve any student or clerk from the operation of the preceding provision.

Students-at-law and articled clerks in attendance or under service, elsewhere than in Toronto who are entitled to present themselves either for their First or Second Intermediate Examinations in any Term before Michaelmas Term, 1890, may attend the term of the School for 1889-1890, and upon proof of such attendance and of passing the examination at the close thereof the same shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be.

Honours and scholarships in connection with the Intermediate Examinations shall be awarded only in connection with the Law School Examinations held at the close of the School Term.

In view of the abrogation of honors and scholarships for the First and Second Intermediate Examinations of Michaelmas and Hilary Terms next at the first Law School examination the scholarships shall be for each Intermediate Examination as follows:—

One of one hundred dollars.

One of sixty dollars.

And five of forty dollars.

The Committee further recommend that a rule or rules embodying the above recommendations be forthwith passed.

The Committee think that some slight amendments only will require to be made to Rules 160 to 164 inclusive.

The report was read, considered, and adopted.

Ordered that leave be granted to introduce a rule founded on the report of the Committee.

The rule was carried unanimously, and the same is as follows:

Students-at-law and articled clerks in attendance or under service in Toronto, who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, shall attend the term of the School for 1889-1890, and the examination at the close thereof, if passed by such students or clerks, shall be allowed to them in lieu of their First or Second Intermediate Examinations, as the case may be.

The Legal Education Committee may, under special circumstances, relieve any student or clerk from the operation of the preceding provision.

Students-at-law and articled clerks in attendance or under service elsewhere than in Toronto who are entitled to present themselves either for their First or Second Intermediate Examinations in any Term before Michaelmas Term, 1890, may attend the term of the School for 1889-1890, and upon proof of such attendance and of passing the examination at the close thereof the same shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be.

Honours and scholarships in connection with the Intermediate Examinations shall be awarded only in connection with the Law School Examinations held at the close of the School Term.

In view of the abrogation of honours and scholarships for the First and Second Intermediate Examinations of Michaelmas and Hilary Terms next at the first Law School examination the the scholarships shall be for each Intermediate Examination as follows :—

One of one hundred dollars.

One of sixty dollars.

And five of forty dollars.

To the extent and for the time which may be necessary to give effect to the foregoing rules the operation of all rules inconsistent with them is hereby suspended or modified.

Ordered that Mr. Colin Macdougall be appointed a member of the Committee on Journals and Printing, in the place of the late Hon. T. B. Pardee, deceased.

Ordered that Mr. Martin's motion do stand adjourned to the second day of next Term.

Mr. Lash moved for leave to withdraw his motion.—*Carried.*

Ordered that the day for opening the Law School be Monday, the 7th of October next.

Pursuant to order, the report of the Special Committee on building accommodation was taken up.

The plan by Mr. Storm, the architect, was laid on the table.

Ordered that the Special Committee be instructed to proceed with the alterations in general accordance with the plan of Mr. Storm.

Convocation adjourned.

Notes on Exchanges and Legal Scrap Book.

VEHICLES.—The Supreme Court of Rhode Island in *State* v. *Collins*, decided that a bicycle is a "carriage" or "vehicle," within the meaning of the Public Statutes of Rhode Island, c. 66, s. 1, requiring every person travelling with any carriage or other vehicle, on any highway or bridge, to turn to the right on meeting another person so travelling. We are of the opinion that it is a carriage or vehicle which carries a person mounted upon it, and which is propelled and driven by him. The word "vehicle" is certainly broad enough to include any machine which is used and driven on the travelled part of the highway for the purpose of conveyance upon the highway. The purpose of the section is to prevent accident or collision, and such accident or collision may happen from a bicycle and other carriage meeting, unless the rule laid down in the section is observed. In *Taylor* v. *Goodwin*, L.R., 4 Q.B.D. 228, it was decided that a bicycle is a carriage, within the Act which forbids the driving of any sort of carriage "furiously, so as to endanger the life or limb of any passenger."—*Albany Law Journal.*

FAILURES OF JUSTICE.—The following remarks were made by Hon. J. T. Brooks at the last annual meeting of the Ohio State Bar Association, in reference to what is amongst our neighbours a growing evil—the miscarriage of jus-

tice in criminal matters: "The devices of the profession in criminal practice are the scandal of the age. Murder is committed in open day for greed, hate, or revenge. The astute lawyer pleads emotional insanity, or finds justification in the barbaric instincts which still linger in the human breast, and the murderer goes unhung. The constant acquittal of criminals, through technical objections to the record, and by emotional appeals to the jury, are the deepest stain on the profession. A few years ago a school teacher in Chicago, standing in his home, in the presence of his wife, in broad daylight, was shot dead by a ruffian who bore against him a personal grievance, and had come to his home for the express purpose of murdering him. Eminent counsel was retained for the defence, and an acquittal secured. It was spoken of as a great professional triumph. But the assassin should have found a grave beneath the gallows, and the lawyer expelled from the Bar. A few years ago the Chief Justice of Kentucky was murdered by a man against whom the Supreme Court had affirmed a judgment. The assassin is free, but, unfortunately, murder is so common there, that the fact of his freedom is no reproach to the State. But these cases are but two in hundreds. Shall a prisoner then be tried without counsel? No; but if guilt is certain, let the facts and the law be stated, and the accused put upon the mercy of the court. The law should be vindicated, even at the expense of an ancient legal maxim; and if I can secure that dominion of the moral sense for which I contend I will risk the lawyer doing justice to his client when there is reasonable doubt of his guilt. There are omens in the air which indicate that the people are not satisfied with certain conditions of law, nor with the present course of the administration of justice. Most of them may be traced to the want of moral purpose and patriotic spirit among lawyers. It is well that we should heed them."

TELEGRAMS AS EVIDENCE.—In the case of *The Anheuser-Busch Brewing Company* v. *Hutmacher*, 21 North-Western Rep. 626 (Ill.), Judge Bailey in delivering the judgment of the court uses the following language: "The position taken is that the papers delivered by the telegraph company to the plaintiff are only copies, the originals being the telegrams signed by the defendant, and delivered by it to the telegraph office from which the message was sent, and it is urged that such originals should have been produced, or some proper foundation laid for the introduction of secondary evidence of their contents. The application of the rule of evidence here contended for must depend upon whether the messages delivered by the telegraph company to the plaintiff, or those delivered by the defendant to the telegraph operator, are, as between the parties in this suit, to be deemed the originals. In *Durkee* v. *Railroad Company* (29 Vt. 127) the rule which we consider the most reasonable one is laid down, viz.: That the original, where the person to whom it is sent takes the risk of its transmission, or is the employer of the telegraph, is the message delivered to the operator; but where the person sending the message takes the initiative, so that the telegraph company is to be regarded as his agent, the original is the message actually delivered

at the end of the line. The fact that the defendant took the initiative in sending the telegrams, thus employing the telegraph company as its agent, is clearly shown by its letters to the plaintiff read in evidence. Having thus employed such agent to convey communications to the plaintiff, it must be held to be bound by the acts of its agent, to the extent at least of making the messages delivered originals, thereby constituting them primary evidence of the contents of the messages sent. It should be observed that there is no suggestion that any of these messages were erroneously transmitted, and the case, therefore, does not present the question upon which there is some conflict in the authorities, whether the sender of a telegram makes the telegraph company its general agent, so as to become responsible for the acts of such agent, where there is a departure from the authority actually given, by transmitting the message incorrectly."

FIXTURES.—Where a railroad company dug a well, and put in a pump and a boiler for the purpose of filling its tank on the line of its railroad, and used the same for several years, believing the well and attachments were on its own land, when it is discovered that they are on another's land the company can remove the pump and boiler without paying the owner of the land therefor. There is scarcely any kind of machinery, however complex in its character, or no matter how firmly held in its place, which may not with care, be taken from its fastenings, and moved without any serious injury to the structure where it may have been operated, and to which it may have been attached. That the simple fact of annexation to the realty is not the sole and controlling test of whether a certain article is a fixture or not, is very well illustrated by the fact that trees growing in a nursery, and kept there for sale, are personal property, while trees no larger, if transplanted to an orchard, become real estate. On the other hand, there are very many things, although not attached to the realty, which become real property by their use—keys to a house, blinds and shutters to the windows, fences and fence-rails, etc. It can readily be seen that one of the tests of whether a chattel retains its character or becomes a fixture is the uses to which it is put. If it be placed on the land for the purpose of improving it, and to make it more valuable, that is evidence that it is a fixture. Applying this criterion to the boiler, we are led to inquire whether this benefited the land of plaintiff. The real estate upon which this boiler was placed was a narrow strip in the city of Burlingame, and it cannot be contended that this well, boiler, and the attachments could have greatly benefited this small tract of land. They were not placed there for the purpose of enhancing its value. Ordinarily it would not enhance the value of such property in a city as this small piece of ground, by digging a well thereon like the one in question; and the only value added thereto by placing a pump, boiler, and boiler-house like those in controversy would be what they were worth as chattels. The test of whether real state is benefited by the act of annexation has been repeatedly applied by the courts to determine whether the chattel annexed became a fixture or not. 11 Alb. L.J. 151; *Woollen*

Mill Co. v. *Hawley*, 44 Iowa 57; *Taylor* v. *Collins*, 51 Wis. 123; *Huebschmann* v. *McHenry*, 29 *id.* 655; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 645, note; *Railroad Co.* v. *Canton Co.*, 30 Md. 347; *Wagner* v. *Railroad Co.*, 22 Ohio St. 563. It has been held that before personal property can become a fixture by actual physical annexation, the intention of the parties and the uses for which the personal property is to be put must all combine to change its nature from that of the chattel to that of the fixture. *Teaff* v. *Hewitt*, 1 Ohio St. 511; *Ewell Fixt.* 293; *Woollen Mill Co.* v. *Hawley, supra.* It is conceded that the railroad company was a trespasser, yet it was not a wilful one. It dug the well, put in the pump and boiler, and erected the boiler-house under the belief it was occupying its own land, and only discovered its mistake after some years of occupation. There is nothing to show that it wished to gain anything by digging the well where it was located rather than on its own land. In fact it is stated that two feet of the well is upon its own land. It can be safely presumed that the well would have been as good a one if it had been placed on the defendant's side of the division line instead of the plaintiff's. It dug the well, put in the pump and boiler, for the sole purpose of operating its railroad, and not to improve the land where the property was placed. The company began condemnation proceedings to obtain the land, but did not follow them to a conclusion. If it had it would have been compelled to only pay for the land, and not for its own improvements thereon. This rule is well established by authority. *Cohen* v. *Railway Co.*, 34 Kans. 158; *Justice* v. *Railroad Co.*, 87 Penn. St. 28; *Daniels* v. *Railroad Co.*, 41 Iowa 52; *Lyon* v. *Railroad Co.*, 42 Wis. 538; *Greve* v. *Railroad Co.*, 26 Minn. 66; *Wagner* v. *Railroad Co., supra; Schroeder* v. *De Graff*, 28 Minn. 299. While it is the general rule in regard to annexation made by a stranger with his own materials on the soil of another, without his consent, that the owner of the materials loses his property because he is presumed to have parted with it, and dedicated it to the owner of the land, yet the peculiar circumstances under which this well was dug would indicate there should be a modification in this instance. *Lowenberg* v. *Bernd*, 47 Mo. 297. If he had placed it there, even under a mistake, for the purpose of ultimately improving the real estate the law might under this state of facts have held it to have been the property of the owner of the real estate, but under the agreed statement it was placed there solely for the purpose of better operating its own railroad. If it had been placed on its own right of way, and that afterward abandoned, then under a respectable list of authorities it would have been permitted to have taken away the pump, boiler, and boiler-house. We can see no reason for a distinction that would have allowed any compensation to plaintiff if condemnation proceedings had been instituted after occupation and placing improvements upon the land, and prosecuted to a conclusion, and an action brought in the way this one was. Kans. Sup. Ct., June 7, 1889. *Atchison T. & S.F.R. Co.* v. *Morgan.* Opinion by Holt, J.—*Albany Law Journal.*

DIARY FOR NOVEMBER.

1. Fri.....All Saints' Day. Sir Matthew Hale born 1609.
2. Sat.... .Last day for filing papers and fees for Final Exam.
3. Sun.....*Twentieth Sunday after Trinity.* O'Connor, J.Q.B.D., died 1887.
5. Tues...1st Intermediate Examination.
7. Thu....2nd Intermediate Examination.
9. Sat.....Prince of Wales born, 1841.
10. Sun.....*21st Sunday after Trinity.* J.H. Hagarty, 12th C.J. of Q.B, 1878. Richards, 10th C.J. of Q.B., 1868. J.
12. Tues...Court of Appeal sits. Solicitors' Exam.
13. Wed ...Barristers' Examination.
14. Thu ....Falconbridge, J., Q.B.D., appointed 1887.
15. Fri.....Sir M. C. Cameron, J., Q.B., 1878. Macaulay, 1st C.J. of C.P., 1849.
17. Sun.....*22nd Sunday after Trinity.* Lord Erskine died 1823, æt 73.
18. Mon....Mich. Term commences. High Court Justice Stttings begin.
19. Tues...Armour, J., gaz. C.J., Q.B.D., 1887. Galt. J., gaz. C.J., C.P.D., 1887.
21. Tues...J. Elmsley, 2nd C.J. of Q.B., 1796. Princess Royal born, 1840.
24. Sun.....*23rd Sunday after Trinity.*
25. Mon....Marquis of Lorne, Governor-General, 1878.
30. Sat..... .Moss, J.A., appointed C.J. of Appeal, 1887. Street, J., Q.B.D., and McMahon, J., C.P.D., appointed, 1887.

Reports.

ONTARIO.

ONTARIO VOTERS' LISTS, COUNTY OF ELGIN.

(Reported for THE CANADA LAW JOURNAL.)

RE THOMAS, AN INDIAN.

The Manhood Suffrage Act—Unenfranchised Indians—Property qualification—Who are British subjects—Distinction between Negro and Indian.

This was an appeal to the County Judge's Court of Revision for the Township of Yarmouth, under the Manhood Suffrage Act, by an unenfranchised Indian, to have his name added to the Provincial Voters' List. The applicant is without property qualification.

Held, that the second section of the Act does not apply to him because his case is excepted, and he is in a different position under the Act from a negro.

[HUGHES, Co.J., ST. THOMAS.

The tribe of Indians, known as the Oneidas, residing on their own lands in the township of of Delaware, in the County of Middlesex, about forty years ago left their reserves in the State of New York and divided themselves into two bands, one part going to settle at Green Bay and the other coming to this Province. They purchased lands from British subjects with their own money; the title to their lands was not taken in their own individual or corporate names (as it might have been). They caused the owners from whom they purchased to surrender their titles to the Crown, to be held by our Government in trust for their benefit and use. They occupy the lands in common.

Under the Indian Act they are recognized as a band of Indians who own or are interested in Indian lands in common, of which the legal title is vested in the Crown, and the expression "Indian" means any male person of Indian blood, reputed to belong to a particular band.

The subject of this appeal is an Indian who held an allotment on the lands held in trust by the Crown for his band, which allotment he had leased to his brother, and left the reserve to live on the farm of a land holder in the township of Yarmouth, in this county. He has resided under the occupancy of a domicile in that way for three years past, and has adopted all the habits of an industrious labouring man. He is a native of the Province, and a British subject of full age. It was claimed by the appellant that he has the same right to the Manhood Franchise as any other man possessing the qualifications under the Manhood Franchise Act, because he has abandoned the Indian life, and is in all respects entitled as much as a white man to be entered on the list.

HUGHES, J.—The expression "enfranchised" Indian means any Indian who has received letters patent granting to him in fee simple any portion of the reserve which has been allotted to him by the band to which he belongs, or who has received letters patent for an allotment of the reserve.

The Manhood Suffrage Act abolishes property and income qualification for voters as respects the Legislative Assembly of this Province, except as therein provided, viz.:

Unenfranchised Indians, not residing among Indians, or on an Indian reserve, in view of legal enfranchisement, must have the same property qualification in order to entitle them to vote as was required before the passing of the Manhood Suffrage Act.

Enfranchised Indians, like other persons, are entitled to vote without having a property qualification.

The subject of this appeal is not an enfranchised Indian within the meaning of the Indian Act. We must look to that Act for the proper interpretation of what the Manhood Franchise Act means by "enfranchised" and "un-

enfranchised" Indian. If he were the former no doubt could exist; the claim to place his name on the list would be beyond dispute; and whilst I do not see any particular definition of the latter expression, we must take it to mean an Indian who has not received letters patent granting to him in fee simple any portion of the reserve which has been allotted to him or to his wife and minor children, by the band to which he belongs; or an unmarried Indian who has not received letters patent for an allotment of the reserve.

He is an Indian because he comes within the purview of section 2 (h) of the Indian Act, and because he is reputed and acknowledged to belong to this particular band, whose lands are held for the band in trust by the Crown.

The second section, sub-sec. 2, of the Manhood Fanchise Act excepts him as not residing among Indians or on an Indian reserve unless he has the property qualification, or rather gives him in lieu of legal enfranchisement (which must mean what it is defined to be under the Indian Act) the right to vote, but requires the property qualification as then before required, and without that he is not entitled to vote.

I find myself obliged to hold that he is not entitled to vote in the same way as other men are, whose parents sought asylum in this Province from slavery or other wrongs done to their parents whether as Indians or negroes in the United States, because he is an unenfranchised Indian, not possessed of the necessary property qualification. He is a man of full age, a subject of Her Majesty by birth, an industrious man, working as other labouring men ought to work, possessed of a domicile in this township, has resided in the Province all his life, and continuously in the township for three years, but stands at a disadvantage in so far as his franchise is concerned, with negroes and other men of colour—who are not Indians—because he does not possess the necessary qualifications as to property.

It is not for me to criticise but to interpret, and when needful, to administer Acts of Parliament as I find them. It seems an anomaly under the Act that a worthy hard-working tiller of the soil, as this Indian is represented to be, should stand at a disadvantage on account of the peculiar shade of his complexion or the texture of his hair compared with, and whilst the most worthless and indolent negro or mulatto —who is circumstanced in every other respect just as he is—is entitled without property qualification to be ranked as an elector.

I am, I confess, very regretfully obliged to dismiss this appeal.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

HOLMES *et vir v.* CARTER.

Seizure of bank shares in trust—Onus probandi—Res judicata.

The respondent, having obtained judgment against A.M., served a writ of *saisie-arret* upon Molson's Bank. The Bank, through its manager, declared they held 115 shares of the capital stock of the Molson's Bank, and the dividends accrued thereon since 1879 standing in the name of Alex. M. in trust for R. A. M. *et al.*

E. A. M. intervened, and claimed that the shares were her property and that the seizure should be set aside. The respondent contested the intervention, contending that the shares had been purchased with the monies of A.M., and so placed in trust to prevent his creditors having any remedy against these shares, and moreover pleaded *res judicata*, the Privy Council having already decided that the dividends of a certain number of the shares seized and standing in the same account in trust, were not the property of E.A.M. *et al.*

The evidence at the trial established that E. A.M. was the wife duly separated as to property of A.M., and that she had means of her own, and that the shares in question had been originally purchased by A.M. as her duly authorized agent. There was no evidence to prove that the shares had been purchased with A.M.'s monies. The decision of the Privy Council was that E.A.M. had no right to claim the interest of 33 shares under the will of the late Hon. W. Molson, nor to rank as a creditor on her husband's estate as creditor on the grounds of insolvency.

Held, reversing the judgment of the Court of Queen's Bench, that the shares seized being held by the Bank in trust for E.A.M. *et al.*, the onus of proof was on the respondent to show that the shares had been purchased with A.M.'s

monies when insolvent. *Sweeney* v. *Bank of Montreal* followed, 12 App. Cas. 617.

2. That as the appellant in the case which was decided by the Privy Council had only claimed the dividends of other shares as forming part of an estate in which she was interested as substitute, and that she now claims the *corpus* and dividends of these 115 shares as her own property, the plea of *res judicata* was not available to the respondent. Art. 1241 C.C.

Appeal allowed with costs.

Laflamme, Q.C., and *Robertson*, Q.C., for appellants.

H. Abbott, Q.C., for respondent.

STEPHEN H. THOMPSON *v.* THE MOLSON'S BANK.

The Banking Act—R.S.C., c. 120, secs. 53 and seq.—Warehouse receipts—Parol agreement as to surplus—Effect of—Locus standi—Art. 1031, C.C.

The Molson's Bank took from one H. several warehouse receipts as collateral security for commercial paper discounted in the ordinary course of business, and having a surplus from the sale of the goods represented by the receipts after paying the debts for which they were immediately pledged, claimed under a parol agreement to hold that surplus in payment of other debts due by H. H. having become insolvent, T. (appellant) brought an action against the Bank under art 1031 C.C., claiming that the surplus must be distributed rateably among the creditors generally. H. was a member of the firm of H. & H., and they were not parties to the suit.

Held, affirming the judgment of the courts below, that the parol agreement was not contrary to the provisions of the Banking Act, c. 120, s. 52 and seq., and that after the goods were lawfully sold, the money that remained after applying the proceeds of each sale to its proper use, was simply money held to the use of H., subject to the terms of the parol agreement. (RITCHIE, C.J., dubitante, and FOURNIER, J., dissenting.)

Per TASCHEREAU, J.—That H. & H. ought to have been made parties to the suit.

Appeal dismissed with costs.

Robertson, Q.C., and *Falconer* for appellant.

H. Abbott, Q.C., for respondents.

J. H. MITCHELL *v.* CHARLES HOLLAND, *es qual.*

C.C.P., Art. 19—Right of suit by trustees—Promissory notes given as collateral—Prescription of notes will not prescribe the debt.

The appellant, who was trustee for certain creditors of Robert Mitchell & Sons, sued the respondent, alleging a transfer to him by notarial deed dated the 1st of Dec., 1877, by John Ross Mitchell, of a sum of $4,720.20 due by the respondent as and for the price of certain immovable property in the City of Montreal, sold to him by the said John Ross Mitchell by notarial deed on 5th of January, 1877, and registered, and also a transfer to him of certain promissory notes, signed by the said respondent for the same amount, and representing the said price of sale.

The respondent was a party to the deed of trust, and declared himself subject to the conditions therein contained.

To this action the respondent pleaded that appellant had no action as trustee under art. 19 C.C.P., and that the price had been paid by the two promissory notes which were now prescribed.

Held, affirming the judgment of the Court below, that art. 19 C.C.P. was not applicable to trustees in whom property has been vested by a registered deed and to which deed the defendant was a party.

Burland v. *Moffat*, 11 Can. S.C.R. 76 and *Browne* v. *Pinsonneault*, 3 Can. S.C.R. 102, distinguished.

2nd. That the notes in question were given merely as collateral for the price of sale of the property, and therefore the plea of prescription cannot be maintained.

Appeal dismissed with costs.

McCord for appellant.

H. Abbott, Q.C., and *Lonergan* for respondent.

CANADIAN PACIFIC RAILWAY CO. *v.* COLLEGE OF STE. THERESE.

Expropriation of land—Order by Judge in Chambers as to monies deposited—Not appealable—R.S.C., c. 135, s. 28—42 Vict, c. 9, s. 9, s-s. 31—Persona designata.

The College of Ste. Therese having petitioned for an order for payment to them of a sum of $4,000, deposited by the appellants as

security for land taken for railway purposes, a judge of the Superior Court in Chambers after formal answer and hearing of the parties granted the order, 42 Vict., c. 9, sec. 9, s-s. 31. The railway company appealed against this order to the Court of Queen's Bench for Lower Canada (Appeal side), and that court affirmed the decision of the judge of the Superior Court. On appeal to the Supreme Court of Canada it was

Held, that as the proceedings had not originated in the Superior Court of the Province of Quebec, the case was not appealable. R.S.C., c. 135, s. 28.

2. That the judge of the Superior Court when he made the order in question acted as a *persona designata.*

Appeal quashed with costs.

H. Abbott, Q.C., and *Ferguson* for appellants.

Pagnuelo, Q.C., for respondents.

THE EXCHANGE BANK OF CANADA *v.* GILMAN.

Art. 451 C.C.P.—Retraxit—Subsequent action—Document not proved at trial—Inadmissible on appeal—Lis pendens and res judicata—Pleas of.

The Exchange Bank of Canada in an action they instituted against G., filed a withdrawal of a part of their demand in open court, reserving their right to institute a subsequent action for the amount so withdrawn. The court acted on this retraxit, and gave judgment for the balance. This judgment was not appealed against. In a subsequent action for the amount so reserved, it was

Held, reversing the judgment of the Court below, that the provisions of art. 451 C.C.P. are applicable to a withdrawal made outside and without the interference of the court, and cannot affect the validity of a withdrawal made in open court and with its permission.

2nd. That it was too late in the second action to question the validity of the retraxit upon which the court had in the first action acted on and rendered a final judgment.

3rd. That a document relied on in the Court of Queen's Bench not proved at the trial, as setting aside the final judgment rendered in the first action, cannot be relied on or made part of the case in appeal.

Montreal L. & M. Co. v. *Fauteux*, 3 Can. S.C. 433, and *Lyonnais* v. *Molson's Bank*, 10 Can. S.C.R. 527 followed.

4th. That under the circumstances the defendant's pleas of *lis pendens* and of *res judicata* could not be maintained.

Appeal allowed with costs.

Macmaster, Q.C., for appellant.

Gilman for respondent.

DUFRESNE *et al. v.* DAME MARIA DIXON.

Action en nullite de decret—Registration of deed—Art. 2089 C.C.—Preference between purchasers who derive their respective titles from the same person.

D. *et al.*, judgment creditors of one W.A.C., seized and sold a lot of land situate in the City of Montreal, as belonging to his estate. This lot had originally belonged to Dame M.D., who sold it to W.A.C. *et al.*, and subsequently W.A.C., who became the registered owner of the lot, re-assigned it to Dame M.D. The property was occupied by Dame M. D. through her tenant at the time of the seizure.

The sheriff's sale took place on the 3rd of October, 1884. Dame M. D. registered her deed of re-assignment on the 28th of November, 1884, and on the 4th of May, 1885, the purchasers registered their deed of purchase.

The respondent by petition to the Superior Court prayed for the setting aside of the sheriff's decree.

Held, affirming the judgments of the courts below, that respondent having been for a long time in open, peaceable, and public possession of her property, and notably so at the time of the seizure, the sheriff's seizure and sale thereof at the instance of the appellant, was null, as having been made *super non domino.*

2nd. That notwithstanding the adjudication by the sheriff on the 3rd of October, 1884, the title not having been granted until the 4th of May, 1885, respondent, who had registered her deed of retrocession on the 28th of November, 1884, was entitled to the conclusions of her petition.

Appeal dismissed with costs.

Pagnuelo, Q.C., and *Geoffrion*, Q.C., for appellant.

Lacoste, Q.C., and *Grenier* for respondent.

[June 14.

MILLER *v.* STEPHENSON.

Goods sold and delivered—Evidence—To whom was credit given—Direction to jury—Withdrawal of evidence from jury—New trial.

In an action against McK. and M. for goods sold and delivered, the plaintiff swore that he had sold the goods to the defendants, and on their credit, and his evidence was corroborated by the defendant McK. The defence showed that the goods were charged in plaintiff's books to C. McK. & Co. (the defendant McK. being a member of both firms), and credited the same way in C. McK. & Co.'s books, and that the notes of C. McK. & Co. were taken in payment, and it was claimed that the sale of the goods was to C. McK. & Co.

The trial judge called the attention of the jury to the state of the entries in the books of the plaintiff and of C. McK. & Co., and to the taking of the notes, and to all the evidence relied on by the defence, and he left it entirely to the jury to say as to whom credit was given for the goods.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the case was properly left to the jury, and a new trial was refused.

Appeal dismissed with costs.

Weldon, Q.C., and *C. A. Palmer* for appellant.

McLeod, Q.C., and *A. S. White* for respondent.

[June 14.

CANADIAN PACIFIC RAILWAY *v.* WESTERN UNION TELEGRAPH CO.

Telegraph Company—Incorporated in United States—Power to operate line in Canada—Sole right of operating over line of Canadian railway—Agreement therefor—Violation of railway charter—Restraint of trade.

In 1869 the European and North American Railway Co. entered into an agreement with the Western Union Telegraph Co., a company incorporated in the State of New York with the right of constructing lines of telegraph and operating the same in the State, by which agreement the telegraph company was granted the exclusive right of constructing and operating for 99 years a line of telegraph over the road of the railway company from Boston, Mass., to St. John, N.B. In 1888 the latter road was operated by the New Brunswick Railway Co. under lease from the St. John and Maine Railway Co., and the Canadian Pacific Railway in that year undertook to establish a telegraph line from Montreal to St. John, and run the same over that portion of the road controlled by the Western Union lying between Vanceboro', Maine, and St. John. The Supreme Court of New Brunswick sitting in equity grant aed perpetual injunction restraining the Canada Pacific Railway and New Brunswick Railway Co. from interfering with their exclusive right in building the said line. On appeal to the Supreme Court of of Canada from the decree ordering the issue of such injunction,

Held, GWYNNE, J., dissenting, that the fact of the company being a foreign corporation, empowered by its charter to construct and operate telegraph lines in a foreign country does not prevent it from enforcing the agreement for an exclusive right of operating such lines in Canada, and the injunction should be maintained.

Per GWYNNE, J.—That such a power vested in a foreign corporation might be very prejudicial to the interest of the inhabitants of Canada, and should not be recognized nor given effect to in the courts of this country.

Held, also, that the agreement with the telegraph company did not create a monopoly in favour of that company, and was not an agreement in restraint of trade and commerce.

Appeal dismissed with costs.

Weldon, Q.C., and *Ferguson* for the appellants.

Hector Cameron, Q.C., and *Barker*, Q.C., for the respondents.

[June 14.

WALKEN *v.* HIGGINS.

Libel—Innuendo—Damages—Unnecessary appeal—New trial.

W., a judge of the Supreme Court of British Columbia, and formerly premier of the province, brought an action against H., editor of a newspaper published in Victoria, B.C., for publishing in said paper the following article, alleged by W. to be libellous, copied from an Ottawa paper:

"Extract from *The Daily British Colonist*, published at Victoria, B.C., on the 20th day of November, 1885:

THE MCNAMEE-MITCHELL SUIT.

"In the sworn evidence of Mr. McNamee, defendant in the suit of *McKenna* v. *McNamee*, lately tried at Ottawa, the following passage occurs: 'Six of them were in partnership (in the Drydock contract) out in British Columbia, one of whom was the premier of the province.' The premier of the province at the time referred to was Hon. Mr. Walkem, now a judge of the Supreme Court. Mr. Walkem's career on the Bench has been above reproach. His course has been such as to win for him the admiration of many of his old political enemies. But he owes it to himself to refute this charge. We feel sure Mr. McNamee must be laboring under a mistake. Had the statement been made off the stand it would have been scouted as untrue; but having been made under the sanctity of an oath it cannot be treated lightly, nor allowed to pass unheeded."

The innuendoes alleged to be contained in this article were, shortly, that W. corruptly entered into partnership with McNamee while holding offices of public trust, and thereby unlawfully acquired large sums of public money; that he did so under cloak of his public position and by fraudulently pretending that he acted in the interest of the Government; that he committed criminal offences punishable by law; and that he continued to hold his interest in the contract after his elevation to the Bench.

On the trial a verdict was found for the plaintiff, with $2,500 damages, and the defendant obtained from the full court two rules *nisi*, one for leave to enter a non-suit, or judgment for him, and the other to have the judgment entered on the verdict, set aside and a new trial ordered. Both rules were discharged, and the defendant, by order of a judge of the court below, brought two appeals to the Supreme Court of Canada.

Held, that though the article was libellous it was incapable of all the innuendoes attributed to it, and the consideration of these innuendoes should have been distinctly withdrawn from the jury, which was not done.

Per STRONG, FOURNIER, TASCHEREAU and GWYNNE, J.J., that though the case was improperly left to the jury, yet he suffered no prejudice thereby, other than that of excessive damages, and the verdict should stand on the plaintiff's filing a consent to have the damages reduced to $500.

Per RITCHIE, C.J., that there had been a mistrial, and in order to avoid a new trial the consent of both parties to the reduction of damages was necessary.

Per GWYNNE, J., that two appeals were not necessary, and in any event the appeal on the rule for leave to enter a non-suit should be dismissed with costs, and only one bill of costs should be taxed.

Christopher Robinson, Q.C., and *Bodwell* for the appellant.

S. H. Blake, Q.C., and *Gormully* for the respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

HAY *v.* BURKE.

In the note of this case in our last number the printers accidentally omitted two lines, and as the note still made sense the omission escaped notice. The second paragraph of the note should read as follows:

"Where a place has been so designated, the holder of the instrument may send notice to the party at that place, even if he has reason to think, or even knows, that that place is not the party's place of residence or place of business."

Re HARVEY AND PARKDALE.

Municipal corporation—Expropriation of one foot strip of land across street—Quantum of damages—Local improvements.

H. & M., the owners of a block of land in Parkdale, laid it out in building lots, dedicating as a street called D. Street a portion of it running through it from a street on the east to within one foot of its west limit, the one foot being reserved because at that time W., the owner of the land adjoining on the west, refused to dedicate any portion of it for the purpose of carrying D. Street through to the next street to the west. Subsequently W. laid out his land in building lots, dedicating as a street, also called D. Street, a portion of it running (in the same line as the portion dedicated by H. & M.) through it from the street on the west to within one foot of its east limit, the one foot reserved by him immediately abutting on the

strip reserved by H. & M. Subsequently H. & M. sold all their land except the one-foot strip, and afterwards the corporation expropriated the two strips to make D. Street a thoroughfare, and H. & M. were allowed merely nominal damages for their strip.

Held (BURTON, J.A., dissenting), that this was right, there being no evidence that the property had any market value in the hands of the owners, or was worth anything except for the purpose of opening the street, or that it was capable of being put to any other use whatever. The higher price that H. & M. might have obtained for their lots if the street had been made a thoroughfare before the lots were sold, or the price that the residents on the street might be willing to give to have the obstruction removed could not be considered as elements in fixing the damages.

Per OSLER, J.A.—Where works are done under the local improvement clauses of the Municipal Act, compensation for property expropriated is to be ascertained in the same manner, and by the application of the same principles, as in cases where the corporation are not acting under those clauses, and this whether the corporation initiate the proceedings or they are put in motion by the petition of the parties who desire the improvements to be made. There is nothing to justify the notion that in the latter case more is to be paid for the work than if the cost had to be borne by the corporation.

Judgment of BOYD, C., 16 O.R., 372, affirmed.

The Attorney-General for Ontario (*Mowat*, Q.C.), for the appellants.

J. H. Macdonald, Q.C., and *C. R. W. Biggar* for the respondents.

FINCH *v.* GILRAY.

Landlord and tenant—Payment of taxes by tenant—Rent—Tenant acquiring title by possession—Real Property Limitation Act—R.S. O., c. 111, *s.* 5, *s-s.* 6—*Acknowledgment of barred debt.*

A tenant agreed to pay for certain premises six dollars a month and taxes, and for some eighteen years remained in possession, paying the taxes to the municipality and paying nothing else.

The tenant, after the expiration of this period, gave to his landlord an acknowledgment of indebtedness for rent for the whole period.

Held, that a payment of taxes was not a payment of rent within the meaning of the Real Property Limitation Act, and that the tenant, although he had always intended to hold merely as tenant, had acquired title by possession, and could not make himself liable for rent accruing after the expiration of the statutory period by giving to the landlord an acknowledgment of indebtedness in respect of it.

Judgment of the Queen's Bench Division reversed, and that of STREET, J., at the trial restored. See. 16 O.R., 393.

J. B. Clarke for the appellant.

W. M. Douglas for the respondent.

MCINTYRE *v.* HOCKIN.

Master and servant — Wrongful dismissal—Condonation—Province of jury.

In an action of damages for wrongful dismissal tried with a jury, it is for the judge to say whether the alleged facts are sufficient in law to warrant a dismissal, and for the jury to say whether the alleged facts are proved to their satisfaction.

If good cause for dismissal exists, it is immaterial that at the time of dismissal the master did not act or rely upon it, or did not know of it, and acted upon some other cause in itself insufficient. When the master has full knowledge of the nature and extent of misconduct on the part of his servant sufficient to justify dismissal, he cannot retain him in his employment and afterwards at any distance of time turn him away for that fault without anything new, but this condonation is subject to the implied condition of future good conduct, and whenever any new misconduct occurs the old offences may be invoked and may be put in the scale against the offender as cause for dismissal. Condonation is a question of fact for the jury if in the opinion of the judge there is any evidence of it to be laid before them.

Judgment of the County Court of Elgin affirmed.

Moss, Q.C., for the appellant.

J. M. Glenn, for the respondents.

ROBB *v.* MURRAY.

County Court—Jurisdiction—Claim over $200—Liquidated or ascertained amount—R.S.O., c. 47, *s.* 19, *s-s.* 2.

Pending negotiations for the sale by the plaintiff to the defendant of a certain business

as a going concern, the defendant entered into possession, made sales and received moneys, entering the receipts in a cash book. The negotiations fell through, and the plaintiff brought this action in the County Court to recover $271.03, the return of moneys received by the defendant belonging to the plaintiff, being proceeds from sales of goods in plaintiff's shop, as follows: setting forth the sums received on each day by the defendant.

Held, that this sum was not ascertained by its receipt by the defendant and the bringing of the action by the plaintiff for the sum so received. The increased jurisdiction applies only in the comparatively plain and simple cases where by the act of the parties or the signature of the defendant the amount is liquidated or ascertained *as being due* from one party to the other on account of some debt, covenant or contract between them, such ascertainment of the amount by the act of the parties being something equivalent to the stating of an account between them.

Judgment of the County Court of Middlesex affirmed.

Magee for the appellant.

R. M. Meredith for the respondent.

IN THE MATTER OF THE LONDON SPEAKER PRINTING CO. PEARCE'S CASE.

IN THE MATTER OF THE SPEIGHT MANUFACTURING CO. BOULTBEE'S CASE.

Company—Subscription before incorporation—Allotment—Ontario Joint Stock Companies' Letters Patent Act—R.S.O. c. 157, s. 2, s-s. 6—Contributory—Ontario Winding-Up Act—R.S.O., c. 183.

P. signed an instrument purporting to be a subscription for shares in a company "proposed to be incorporated" under the Ontario Joint Stock Companies' Letters Patent Act.

B. signed an instrument purporting to be an agreement to accept shares in a company not at the time incorporated.

P. and B. were not corporators named in the Letters Patent and no shares were in fact ever allotted to them, but they were entered in the books as shareholders, and notices of meetings and demand for payment of calls were sent to them, and in winding up proceedings they were placed on the list of contributories.

Held, that there being no company in existence when the instruments in question were signed, they did not constitute binding contracts to take shares so as, without more, to make P. and D. liable as contributories.

In re The Queen City Refining Co., 10 O.R., 264, explained.

Orders of the County Court of Middlesex and of the County Court of York reversed.

A. C. Jeffery for the appellant P.

H. J. Scott, Q.C., for the appellant B.

MacMillan and *Gregory* for the respective respondents.

LINFOOT *v.* LINFOOT.

Infant—Guardian—R.S.O., c. 137, s. 10.

This was an appeal from the Surrogate Court of Peel.

A contest arose as to the guardianship of two children of William France Linfoot, deceased, between the stepmother of the children and their uncle, and the learned Judge of the Surrogate Court appointed the uncle guardian, holding that he was bound so to do under the authority of *In re Irwin*, 16 Gr., 461, although he was personally of opinion that it would be better for the children that the stepmother should be their guardian.

The stepmother appealed, and the appeal came on to be heard before this court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.), on the 18th of October, 1889.

The Court allowed the appeal, holding that the Judge had the right to exercise a discretion in appointing a guardian, and should take into consideration what was most likely to promote the real benefit of the infants, and was not bound to appoint the uncle in preference to the stepmother. The matter was referred back to the learned Judge, the costs of the appeal to be disposed of by him.

T. J. Blain for the appellant.

E. G. Graham for the respondent.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

GALT, C.J.] [October 18.

IN RE COOKE AND VILLAGE OF NORWICH.

Municipal corporations—By-law for contracting debt—Bonus to manufactory—Debentures not

payable within twenty years—Municipal Act R.S.O., c. 184, secs. 340, 334, 351, 352—Time for moving to quash—Promulgation of by-law—Registry of by-law.

Motion to make absolute an order *nisi* obtained and served on the 20th of September, 1889, to quash a by-law of the village of Norwich to raise the sum of $1,700 by way of bonus to aid an industry in the village.

The by-law was finally passed by the council, after having been voted on by the electors, on the 3rd of June, 1889, and was promulgated on the 20th of June, 1889. It was registered on the 14th of August, 1889.

The by-law stated on its face that it was to come into force on the 2nd of July, 1889, and authorized the issue of three debentures payable at twenty years after the date of issue, and provided that the date of issue should be the 1st of October, 1889.

Held, that the period of payment exceeded twenty years, and the by-law was therefore in contravention of sec. 340, sub-sec. 2, of the Municipal Act, R.S.O., c. 184, and should be quashed.

Held, also, that this by-law was not a by-law by which a rate was imposed, and was therefore not subject to the provisions of sec. 334 of the Act, requiring an application to quash to be made within three months from promulgation; but was a by-law for contracting a debt, and was therefore subject to the provisions of secs. 351 and 352, requiring an application to quash to be made within three months from the registry of the by-law, and this application was therefore in time.

C. J. Holman for the applicant.

Aylesworth for the village.

GALT, C.J.] [Oct. 7.

IN RE WHITAKER AND MASON.

Municipal corporations—Warrants for salary of officer—Refusal of mayor to sign—Application by officer for mandamus—Remedy by action.

An officer of a municipal corporation applied for a mandamus to compel the mayor to sign warrants for the applicant's salary, which the mayor had been called upon to do by a resolution of the municipal council.

Held, that the applicant could maintain an action against the corporation for his salary, and as he had that remedy, a mandamus would not be granted at his instance.

W. H. P. Clement for the applicant.

Aylesworth for the mayor.

Chancery Division.

Div'l Ct.] [June 12.

MCINTYRE *v.* THE EAST WILLIAMS MUTUAL FIRE INSURANCE CO.

Insurance—Further insurance without consent—Notice to company—Payment of assessment—Estoppel—Damages—Amount of Judgment.

Plaintiff on Feb. 1, 1886, insured with defendants for $1,000. He changed his mortgage on the insured property from one loan Company to another, and the latter refused to accept the defendant's Mutual policy, and insured in the L. Assurance Co. for the same amount, and notified plaintiff by letter, who in Dec., 1886, showed the letter to the defendant's Sec.-Treas., and was then told it was all right, and that there was nothing further necessary for him to do. Plaintiff paid defendants assessments in Dec., 1886, and March, 1887. The fire occurred June 30, 1887, and the loss was $2,200. Defendants' by-laws provided that they would not pay more than two-thirds of the actual loss sustained, and that not more than $2,000 would be taken in one risk. The L. Assurance Co. paid their $1,000.

Held, that the showing of the letter to the Sec.-Treas. did not fulfil the requirements of the statute R.S.O. (1877), c. 161, s. 40, so as to charge the defendants.

Held, also, that the receipt of assessments by the defendants after the officer was aware of the other insurance, operated an estoppel on the Co., and must be treated as an exercise of the directors' option to treat the policy as valid.

Held, also (affirming FALCONBRIDGE, J.), that the proper way to arrive at the damages was, first, to deduct the $1,000 paid by the L. Assurance Co. from the $2,200 amount of the loss, and then take two-thirds of the remaining $1,200, making the judgment $800.

R. M. Meredith and *W. Nesbitt* for the plaintiffs.

W. R. Meredith, Q.C., for the defendants.

Div'l Court.] [June 12.

QUAINTANCE *v.* THE CORPORATION OF THE TOWNSHIP OF HOWARD.

Municipal corporation—Agreement subject to passing of a by-law not executed by corporation—Work done under it—Mandamus to raise the money.

Plaintiff entered into an agreement in writing with defendants to do certain work, which contained this clause: "Notwithstanding anything hereinbefore contained to the contrary this agreement . . is made subject to the final passing . of the said by-law . . and in the event of the said by-law not being passed . . then this agreement shall be null and void"

At the trial it was proved the by-law was never finally passed and the agreement was produced to prevent the plaintiff recovering as on a *quantum meruit*.

Held, (reversing FERGUSON, J., and FERGUSON, J.; dissenting), that the defendants were bound by the contract; the stipulation as to the agreement being subject to the final passing of the by-law, must receive a reasonable construction. The defendants' right to refuse to pass the by-law must be confined to the case when the plaintiff has not performed his work properly. The plaintiff, on showing that he had complied with the terms of the contract, is entitled to a mandamus to compel the defendants to raise money to pay him; but as he neglected to furnish a preliminary certificate of an engineer, a new trial was granted to enable him so to do.

Douglas, Q.C., for the appeal.

Aylesworth contra.

Div'l Ct.] [Sept. 6.

JOHNSTON *v.* DENMAN *et al.*

Will—Devise—Legacies charged on real estate.

The testator, after devising certain pecuniary legacies and a home to two of his children until they came of age, provided as follows: "And I will and bequeath unto my daughter, C.J., all my real estate and the remainder of my personal estate after the above legacies are paid."

Held (affirming ROBERTSON, J.), that the legacies were charged on the real estate.

Idington, Q.C., for the plaintiff.

Shepley for the infant defendant.

BOYD, C.] [Sept. 11.

ARGENTINE *v.* SCHRIER.

Will—Construction—Specific bequests—"Home"—Maintenance.

A testator bequeathed to his daughter "a home as long as she may remain single" in his dwelling house.

Held, that though in the case of an infant "home" would probably include maintenance, yet that the legatee in this case being of age, and there being no express words giving her maintenance after minority, she was not entitled to maintenance under the above bequest.

The testator also bequeathed to his wife "the full control of all my real and personal estate, stock and implements during her life-time," and willed that at his wife's decease "all the stock, of whatever kind, with the farming implements on the farm at my wife's decease shall be equally divided between my sons."

Held, that the bequest to the widow of the stock and farm implements was specific, and therefore exempt from the payment of the pecuniary legacies.

Hoyles for the plaintiff.

Moss, Q.C., *J. Hoskin*, Q.C., *J. M. Clark*, and *W. D. McPherson* for various defendants.

Full Court.] [Sept. 12.

REYNOLDS *v.* JAMIESON.

Action for breach of promise—Nonsuit—Release by promisee.

Action of breach of promise of marriage. Plaintiff set up a promise to marry in October, 1885, and a repudiation of it by the defendant in March, 1886. The promise was duly proved, and the evidence of the plaintiff was that in March, 1886, the defendant visited her and told her: "I never asked you to marry, or came to marry you. I never was promised to you." Whereupon she got vexed at him, and ordered him out of the house; that he wanted the engagement renewed and she would not consent to it.

The trial judge nonsuited the plaintiff on the ground that this amounted to an absolute release, and that the relationship between the parties was terminated.

Held, however, that the matter was one which should have been left to the jury; that there

was evidence of the defendant having broken the contract before the interview of March, 1886, and the plaintiff's action was one of the consequences flowing from that breach. The jury might have reasoned that the plaintiff chose to consider the connection at an end, the defendant having previously violated his engagement, and that she was not willing to subject herself to the pain and mortification of being again deceived. There must be a new trial.

Edwards for the plaintiff.

Douglas for the defendant.

BOYD, C.] [Sept. 26.

RE HAMILTON.

Will—Construction—Devise to one for life, then to issue in fee simple—Shelley's case.

Vendor and purchaser petition.

A testator devised lands to his daughter; "to her own use for the full term of her natural life, and from and after her decease to the lawful issue of my said daughter to hold in fee simple."

The daughter contracted to convey in fee simple to a purchaser.

Held, that the court would refrain from making any order on the petition, for that the law on this head seemed to be in a state of uncertainty, if not of transition, and any experiment had better be made in a contested case when all parties interested were represented.

Semble, that the direction that the issue should hold the property in fee simple appeared incompatible with an estate tail in the mother.

Shepley for the vendor.

BOYD, C.] [Oct. 2.

SPAHR *v.* BEAN.

Married woman—Action of libel—In name of married woman only—Married Woman's Property Act, 1884.—R.S.O., c. 132, s. 3—Demurrer.

A married woman may bring an action of libel in her own name without joining her husband as plaintiff.

The omission of the words "either in contract or in tort or otherwise," found in the Married Woman's Property Act, 1884, from sec. 3, R.S.O., c. 132, does not limit the legal effect and operation of that section.

Hoyles for the demurrer.

J. D. King contra.

BOYD, C.] [Oct. 9.

RE CLARK AND CHAMBERLAIN.

Registry Act—Numbers—Letters—Discharge of mortgage—Synonymous names of parties—Uncertainty of grantee.

Vendor and purchaser petition.

A discharge of mortgage referred to the mortgage as 5764, whereas the mortgage was registered as 5764 C.W.

Held, that it was a valid discharge properly registered; the Registry Act, though requiring every instrument to be numbered, says nothing about adding letters, which appear to be only arbitrary marks adopted by the officials for convenience of reference.

A discharge was required by Eliza Switzer, whereas the mortgage purporting to be discharged was made to Elizabeth Switzer.

Held, that this was no valid objection for the identity of the person signing was established by affidavit to the satisfaction of the registrar, and as a matter of family usage the names are synonymous and interchangeable.

In one of the conveyances in the chain of title the grant was to the party of the third part, whereas there were only two parties to the conveyance, and the party of the second part did not execute it.

Held, that this was a valid objection; though the instrument would be at once corrected or reformed as against the grantors; or could be cured by another conveyance drawn with proper certainty.

S. R. Clarke vendor in person.

W. M. Clark for the purchaser.

Practice.

FERGUSON, J.] [Oct. 16.

CANADIAN BANK OF COMMERCE *v.* WOODCOCK.

Married woman—Judgment against—Rule 739—Necessity for proving separate estate.

Upon a motion by the plaintiffs for summary judgment against a married woman under Rule

739, an officer of the plaintiffs swore that the married moman was made a party to the note because he, the deponent, was informed by her husband and believed, and had no doubt, that she had separate estate of her own, and that there was no doubt, so far as she was concerned, that she contracted with respect to her separate estate when she endorsed the note.

The note was made and matured and all the material facts occurred before the passing of the Married Women's Property Act, 1884.

Held, following *Moore* v. *Jackson*, *ante* p. 409, that the plaintiffs were bound to prove the existence of some separate property at the time of entering into the alleged contract, and that this was not shown by the affidavit; and the motion for judgment was refused.

John King for the plaintiffs.

J. M. Clark for the defendants.

GALT, C.J.] [Oct. 17.

PETERS *v.* STONESS.

Rules of court—Construction—Heading—Rules 5, 1008—Summary order for sale of equitable interest in land—Reference.

Rule 5 of the Consolidated Rules provides that "The division of these rules into chapters, titles, and headings is for convenience only, and is not to affect their construction."

Held, that Rule 1,008, notwithstanding the heading "Summary Inquiries into Fraudulent Conveyances" is not limited to cases of equitable interests arising from fraudulent conveyances, but applies to a case where a judgment creditor is seeking to make available the interest of his debtor under an agreement for the purchase of land.

A reference was directed to ascertain what interest the debtor had in the land in question.

Wood v. *Hurl*, 28 Gr. 146, not followed, owing to the change in the law by Rule 5.

Langton for the judgment creditors.

W. M. Douglas for the judgment debtor.

STREET, J.] [Oct. 19.

IN RE SHIBLEY AND THE NAPANEE, TAMWORTH, AND QUEBEC R.W. CO.

Costs—Railway company—Application for warrant of possession—51 Vict., c. 29, s. 165.

Where a railway company, having a right to expropriate land, obtains under s. 163 of the Railway Act, 51 Vict., c. 29, a warrant for immediate possession, and the amount subsequently awarded to the land-owner is not more than he was previously offered by the company as compensation, the costs of the application for the warrant should, under s. 165, be paid by the land-owner.

Delamere for land-owner.

Aylesworth for company.

Appointments to Office.

COUNTY JUDGES.

Prescott and Russell.

P. O'Brian, of L'Original, to be Judge of the County Court of the united Counties of Prescott and Russell, and also to be a Local Judge of the High Court of Justice for Ontario.

Prince Edward.

E. Merrill, of Picton, to be Judge of the County Court of the County of Prince Edward, and also to be a Local Judge of the High Court of Justice for Ontario, *vice* R. P. Jellett.

LOCAL JUDGE H.C J.

Grey.

S. G. Lane, Judge of the County Court of the County of Grey, to be a Local Judge of the High Court of Justice for Ontario.

POLICE MAGISTRATE.

Muskoka and Parry Sound.

W. H. Spencer, of Monck, to be Police Magistrate for the District of Muskoka; save the town of Bracebridge and the Townships of Macaulay and Draper, and also for certain portions of the District of Parry Sound.

CORONERS.

Lanark.

F. McEwen, M.D., of Carleton Place, to be an Associate-Coroner for the County of Lanark.

Lambton.

D. McEdwards, M.D., of Thedford, to be an Associate-Coroner for the County of Lambton, *vice* T. Ovens, M.D., removed from the locality.

Perth.

J. A. Devlin, M.D., of Stratford, to be an Associate Coroner within and for the County of Perth.

DIVISION COURT CLERKS.

Leeds and Grenville.

L. S. Lewis, of Newboro', to be Clerk of the Eighth Division Court of Leeds and Grenville, *vice* H. Kilborn, resigned.

BAILIFFS.

Northumberland and Durham.

John Grimison, of Port Hope, to be Bailiff of the Third Division Court of Northumberland and Durham, *vice* T. O. Monaghan, resigned.

Hastings.

John H. Gordon, of Belleville, to be Bailiff of the First Division Court of Hastings, *vice* Geo. W. Sills, resigned.

Miscellaneous.

Lawyers not unfrequently come to ride in their own conveyances from the clever way in which they have managed the conveyances of their clients.

PROGRESS OF INVENTIONS SINCE 1845.—In the year 1845 the present owners of the *Scientific American* newspaper commenced its publication, and soon after established a bureau for the procuring of patents for inventions at home and in foreign countries. During the year 1845 there were only 502 patents issued from the U.S. Patent Office, and the total issue from the establishment of the Patent Office, up to the end of that year, numbered only 4,347.

Up to the first of July this year there have been granted 406,413. Showing that since the commencement of the SCIENTIFIC AMERICAN there have been issued from the U. S. Patent Office 402,166 patents, and about one-third more applications have been made than have been granted, showing the ingenuity of our people to be phenomenal, and much greater than even the enormous number of patents issued indicates. Probably a good many of our readers have had business transacted through the offices of the SCIENTIFIC AMERICAN, in New York or Washington, and are familiar with Munn & Co.'s mode of doing business, but those who have not will be interested in knowing something about this, the oldest patent soliciting firm in this country, probably in the world.

Persons visiting the offices of the SCIENTIFIC AMERICAN, 361 Broadway, N. Y., for the first time, will be surprised, on entering the main office, to find such an extensive and elegantly equipped establishment, with its walnut counters, desks and chairs to correspond, and its enormous safes, and such a large number of draughtsmen, specification writers, and clerks, all busy as bees, reminding one of a large banking or insurance office, with its hundred employees.

In conversation with one of the firm, who had commenced the business of soliciting patents in connection with the publication of the SCIENTIFIC AMERICAN, more than forty years ago, I learned that his firm had made application for patents for upward of one hundred thousand inventors in the United States, and several thousands in different foreign countries, and had filed as many cases in the Patent Office in a single month as there were patents issued during the entire first year of their business career. This gentleman had seen the Patent Office grow from a sapling to a sturdy oak, and he modestly hinted that many thought the SCIENTIFIC AMERICAN, with its large circulation, had performed no mean share in stimulating inventions and advancing the interests of the Patent Office. But it is not alone the patent soliciting that occupies the attention of the one hundred persons employed by Munn & Co., but a large number are engaged on the four publications issued weekly and monthly from their office, 361 Broadway, N. Y., viz.: The SCIENTIFIC AMERICAN, the SCIENTIFIC AMERICAN SUPPLEMENT, the Export Edition of the SCIENTIFIC AMERICAN, and the Architects and Builders Edition of the SCIENTIFIC AMERICAN. The first two publications are issued every week, and the latter two, the first of every month.

The Canada Law Journal.

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MR. JUSTICE FALCONBRIDGE at the recent sittings of the Assize Court at Toronto made some forcible remarks on the delay of Justice in that Court. It appears that of the 75 jury cases entered for trial at these sittings 28 only were disposed of, and four of these were settled by the litigants themselves. Of the 117 non-jury cases, not one, we believe, was tried, and only 12 appear to have been disposed of by settlement or reference. Of the cases undisposed of, some have been standing for over a year, as remanets from Court to Court. A number of cases on the list are from outside counties, being placed on the Toronto list for convenience of counsel or for similar reasons. One of the cases, which was tried at the last sittings, here occupied twelve days, though it should have been tried at Hamilton, where the parties and nearly all the witnesses reside. It is an injustice to the taxpayers of the County of York that they should be burdened with the expense of trying outside cases, especially while litigation arising within the County is thereby delayed. Some means, either by appointment of new Judges, or re-arrangement of the Assize and Chancery Circuits, or change in the rules as to venue, should be devised to prevent the scandal and failure of justice shown by the present state of the civil docket at Toronto.

FOOT BALL LAW.

Foot ball is with us again, and schools and colleges are made up of two mighty hordes, the kickers and the kicked. It is an old game, known in England before 1175, but the law has never smiled upon it. The *Albany Law Journal* editorially condemns it; the learned editor says: "Base ball is a game of skill and judgment, and is comparatively gentlemanly; foot ball is only a little less rough and not half so entertaining as a prize fight. We almost wish old Noll (the Lord Protector of England) were alive to kick these ruffian kickers out." This, we think, is the latest legal blast against the game.

The first law against it was passed in the 39th year of the reign of the Third Edward, 1365, and it was then forbidden in consequence of its tendency to impede the progress of archery. A similar law was enacted in 12 Richard II., chap. 6, 1388. In the kingdom of Scotland in "the first parliament of King James the First, holden at Perth the XXVI day of May, the Yeir of God, ane thousand foure hundreth twentie foure yeires: and of his reigne the nineteene

yeir," a law was passed saying: "That na man play at the fute-ball." "It is statute, and the King forbiddis, that na man play at the fute-ball, under the paine of fiftie schillings to be raised to the Lord of the land, als oft as he be tainted, or to the Schireffe of the land or his ministers, gif the Lords will not punish sik trespessoures." Under James the Second, in 1457, it was "decreeted and ordained, that the fute-ball and golfe be utterly cryed downe, and not to be used . . . . and to be punished by the Barronis un-law, and gif he takes not the un-law, that it be taken be the Kinges officeares." James the Third decreed against it at his sixth parliament held in Edinburgh in 1471. And in 1491 King James the Fourth enacted "That in na place of the Realme there be used fute-ball, golfe, or other sik unprofitable sportes, for the common gude of the Realme and defence thereof," and directed the use of the bow.

Seeing that his ancestors held these views, we are not surprised that James the First of England—the magnificence of whose court and the fame of whose wisdom and justice and of the civility of whose subjects, allured divers foreign princes, and other strangers of all estates, to make frequent visits to his country—(Scots Acts, 24 June, 1609), we are not surprised that he should deem the game too rough for his heir apparent, and in his "Basilikon Doron" he writes: "From this Court I debarre all rough and violent exercises, as the foot-ball, meeter for lameing than making able the users thereof."

James' famous predecessor, "that bright occidental star, Queen Elizabeth, of most happy memory," was also against foot ball. In the eighteenth year of her reign there was found at the Middlesex Sessions a true bill against sixteen persons, husbandmen, yeomen, artificers, and the like, "with unknown malefactors to the number of a hundred, who assembled themselves and unlawfully played a certain unlawful game, called foot-ball, by reason of which unlawful game there arose amongst them a great affray, likely to result in homicides and fatal accidents." Some seven years after there was a coroner's inquest at "Southemyous" on the body of Roger Ludford, yeoman. It was shewn that the deceased, with one Nicholas Martyn and Richard Turvey, were playing at foot ball in a field, when Ludford ran towards the ball with the intention of kicking it; whereupon Nicholas Martyn "cum cubiti dextri brachii sui" struck Ludford on the forepart of his body, under his breast, giving him a mortal blow and concussion, of which he died in a quarter of an hour. The jury found that Nicholas and Richard in this manner feloniously slew the said John.

In Cromwell's days a youth was indicted for the playing of the game; this is how the indictment ran: "Kent—Before the justices of the peace it was presented that at Maidstone, in the county aforesaid, John Bistrod, of Maidstone, etc., apothecary, with force of arms, did wilfully and in a violent manner run to and fro, and kicked up and down in the common highway and street within the said county and town, called the High Street, a certain ball of leather, commonly called a foot-ball, unto the great annoyance and incumbrance of said highway, and to the great disquiet and disturbance of the good people of this commonwealth passing on and travelling in and upon the same, and in contempt of the laws, etc., and to the evil example of others, and against the public peace."

In early times among the English the great foot ball festival of the year was Shrove-Tuesday—though why Shrove-Tuesday, heaven only knows, unless there was supposed to be some resemblance between the state of some of the players after the scrimmage and the pancakes they had eaten at dinner on that day. Chitty (2 Chit. Crim. La., 494) gives an indictment drawn in the year 1797, by a very eminent pleader, for the purpose of suppressing the ancient custom of kicking about foot-balls on Shrove-Tuesday at Kingston-upon-Thames. We give it in the hope that some of our Canadian officials will have the courage to prefer a similar one against players in our towns. "Surrey.—That A. S. B., late of, etc. (and other defendants), together with divers other evil disposed persons to the jurors aforesaid unknown, being rioters, routers and disturbers of the peace of our said Lord the King, on, etc., with force of arms, at the town, etc., unlawfully, riotously, and routously did assemble and meet together to disturb the peace of our said Lord the King, and being so assembled and met together, did then and there unlawfully, riotously kick, cast and throw a certain foot-ball in and about the said town, and then and there wilfully, riotously, routously made a great noise, riot, disturbance and affray therein, in contempt, etc., to the evil example, etc., and against the peace, etc. And the jurors, etc., do further present, that the said defendants, together with divers other evil-disposed persons to the jurors aforesaid as yet unknown, on the said, etc., with force and arms, at, etc., did unlawfully assemble and meet together, and being so assembled and met together did then and there wilfully kick and cast and throw a certain foot-ball in and about the said town, near the dwelling-houses of divers liege subjects of our said Lord the King, and also in divers streets and common highways there, to the great damage and common nuisance of all the liege subjects of our said Lord the King, residing in the said dwelling-houses and passing and repassing in and along the said streets and highways, to the evil example, etc., and against the peace, etc." These fellows evidently played according to the Rugby rules.

R.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We continue the Law Reports for September comprised in 23 Q.B.D., pp. 261-372 and 42Chy.D., pp.1-92.

APPOINTMENT IN FRAUD OF POWER—POLICY OF ASSURANCE—MEASURE OF LIABILITY OF APPOINTOR—CESTUI QUE TRUST JOINING IN BREACH OF TRUST.

In re Deane, Bridger v. *Deane*, 42 Chy.D., 9, is a decision of the Court of Appeal (Lord Esher, M.R., Cotton and Fry, L.JJ.) on appeal from Kekewich, J. The facts of the case were, that a sum of stock was settled in 1834 upon trust to keep up a policy of assurance on the life of J. B. Deane, and subject thereto upon trust for him for life, and after his decease the fund and the moneys payable under the policy were to be held in trust for his three children, or such one or more of them and in such shares and proportions as Deane should by

deed or will appoint. In 1849 and 1850 Deane and his three children released the trustees from the stock and all liability to keep up the policy, Deane entering into a covenant with the trustees to keep it up, and the stock was transferred by the trustees to Deane. In 1852 Deane appointed the policy to Mrs. Bridger, one of his daughters, to her separate use without restraint on anticipation, upon a bargain with her that she should surrender the policy and pay the money to him. He promised her to effect and keep on foot a fresh policy, and to settle it upon the same trusts as the old one. The trustees, having no notice of this bargain, transferred the policy to Mrs. Bridger, who surrendered it to the office for £897, and paid the proceeds to Deane. Deane effected a new policy but failed to devote it effectually to the trusts. The sum which would have been due on the original policy, had it been kept on foot till Deane's death, would have been over £5,000. It was held by Kekewich, J., that the appointment to Mrs. Bridger was a fraud on the power, and was therefore invalid; and that after his death his estate was liable not merely for £897, but for the sum which would have been received had the policy been kept on foot until his death, and that therefore £5,000 must be raised out of his estate to be distributed as in default of appointment. But the Court of Appeal, though holding this was a correct measure of liability where none of the *cestui que trust* had concurred in the fraudulent appointment, yet were also of opinion that as Mrs. Bridger had actively concurred in the improper transaction, the amount payable by Deane's estate must be diminished by the amount Mrs. Bridger's share would have been in default of appointment had she not concurred; and their Lordships further held that Deane's promise to her to settle a fresh policy, which he failed to do, was not a misrepresentation entitling her to say that she had been deceived into concurring.

VENDOR AND PURCHASER—LIFE ESTATE—UNDISCLOSED RESTRICTIVE COVENANT—ABSTRACT—OMISSION OF DOCUMENT FROM ABSTRACT—POWER OF SALE.

In re Ebsworth and Tidy, 42 Chy.D., 23, an application was made under the Vendors and Purchasers' Act by the purchaser for a declaration that the vendor had not delivered a perfect abstract, nor made out a good title to his property, and for a return of the deposit with interest and costs. The property sold was a life estate. The land on which a house, which formed part of the property, was built was subject to a covenant that no public house or beer shop, or building of a less cost than a specified sum, should be erected thereon. The contract of sale contained no reference to this covenant. The purchaser required proof that the covenant did not bind him. North, J., overruled the objection on the ground that the purchaser had only bought an estate for life, and that the property was then fully built upon, and that the covenant could not interfere with his enjoyment. But on appeal, Lord Esher, M.R., Cotton and Fry, L.JJ., thought the objection a valid one, because an application might be made by the tenant for life under the Settled Land Act to sell the fee simple of the property, in which event the existence of this restrictive covenant would materially affect the price it would bring. Other questions were also raised by the petition. One being

whether the omission of a will, under which the vendor claims title, from the abstract, is an objection—full particulars of the will being given in the recitals of another instrument set out in the abstract. It was held by North, J., that although the abstract was technically defective in not setting out the will, yet as the recital had conveyed all the information about the will necessary, that the abstract was sufficient. Part of the property was subject, together with other land belonging to the vendor, to one tithe rent charge. The contract contained no provision as to apportionment, and it was held by North, J., and the Court of Appeal, that the purchaser could not require the vendor to procure an apportionment at the vendor's expense. The other question, was whether a power of sale in a mortgage in favour of a building society had been duly executed. The mortgage provided that upon default the property should be sold by the trustees for the time being of the building society. The society was ordered to be wound up. Six directors were appointed liquidators, and it was ordered that all acts required or authorized by the Act to be done by the official liquidators might be done by any two of them. By another order, all the property of the society was vested in the six liquidators, with power to exercise the powers of sale conferred by the 95th section of the Companies' Act, without the further sanction of the Court. After this, two of the six liquidators, without any further sanction of the Court, sold the mortgaged property and executed a deed to the purchaser free from the mortgage. North, J., and the Court of Appeal were unanimous that the power of sale had been validly exercised; but while North, J., and Lord Esher, M.R., thought the legal estate had been conveyed by the two liquidators, Cotton and Fry, L.JJ., were of opinion that their conveyance had only passed the legal estate in two-sixths of the property, and that the conveyance of the four other liquidators was necessary in order that there might be a complete conveyance of the legal title.

WILL—CONSTRUCTION—EXECUTORY TRUST FOR SETTLEMENT ON DAUGHTER, HER HUSBAND AND CHILDREN—GIFT OVER SHOWING INTENTION TO INCLUDE CHILDREN OF EVERY MARRIAGE—SECOND HUSBAND.

In *Nash* v. *Allen*, 42 Chy.D., 54, the construction of a will was in question. By this will the testator bequeathed his personal estate upon trusts for his children equally, and directed that in case any of his daughters should marry, the share of such daughter or daughters should be assigned to trustees in settlement "upon such respective marriages" for the benefit of the daughter for life, "and after her or their deceases for the use of her or their intended husband or husbands for his or their life or lives, and after their decease respectively for the children of such marriage or respective marriages," with a gift over in the event of a daughter "without leaving any issue her surviving." The only daughter of the testator was twice married. On her first marriage, she being then an infant, a settlement was made of her share on herself, husband and children, containing no provisions in favor of the husband and children of a future marriage. And this settlement Kay, J., held to be inoperative by reason of the infancy of the lady and its not being according to the trusts of the will. On her second marriage a

settlement of her share was made whereby a life interest was limited to her second husband, who survived her. She died without leaving any issue. The contest was between those children entitled under the gift over, and the second husband. Kay, J., was of opinion that the gift over furnished the key to the proper construction of the trusts of the will, and that as that provided that the gift over was not to take effect except on the daughter dying without issue, it was obvious that would include the children of any marriage she might contract, and therefore under the trusts of the will, the settlement in favour of the second husband was valid.

WILL—CONSTRUCTION—RESIDUE—DIRECTION THAT SHARE SHALL SINK INTO RESIDUE—SHARE OF RESIDUE TO BE SETTLED UPON SAME TRUSTS AS LEGACY.

In re Ballance, Ballance v. *Lanphier*, 42 Chy.D.,62 is another decision of Kay, J., upon the construction of a will. In this case the testator gave legacies upon trust for each of his daughters for life, and after her death for her husband and children, and subject thereto he directed that each legacy "should sink into and form part of my residuary estate, and be applied and disposed of as hereinafter mentioned." He gave his residue to his children equally, "the shares of daughters to be paid to the same trustees respectively, and to be settled upon the same trusts" as their respective legacies. One of the daughters died unmarried. The question was how her share ought to be disposed of? Kay, J., held that the direction for the settlement of the daughter's share of residue being executory, in framing a settlement of this share the Court should modify the ultimate gift over by inserting a limitation in favour of the other residuary legatees, excluding the particular daughter, and that the share of the deceased daughter was divisible accordingly among the other residuary legatees.

DAMAGES—DETENTION OF GOODS—MEASURE OF DAMAGES—RIGHT TO DAMAGES NOT TAKEN AWAY BY APPOINTMENT OF RECEIVER.

In *Dreyfus* v. *The Peruvian Guano Co.*, 42 Chy.D., 66, Kay, J., lays down the principle that where goods of a plaintiff are wrongfully detained by a defendant under circumstances entitling the former to damages, such right to damages is not lost by the appointment of a receiver by consent *pendente lite*. The action was brought for delivery to the plaintiffs of certain cargoes then at sea, to which the plaintiffs claim to be entitled, and for an injunction to prevent the defendants from receiving them, and for damages for detention. The defendants by their pleadings claimed the right to receive the cargoes, and shewed that they intended to receive them. Previous to the hearing a receiver was appointed by consent—at the hearing the plaintiffs proved their title to the cargoes—and Kay, J., held they were entitled to damages for their detention, which he allowed at 5 per cent. on the value of the cargoes up to the date of the judgment. Another point in the case arose in reference to an order of the House of Lords, whereby it was declared that the defendants were entitled to be reimbursed by the plaintiffs certain expenses "so far as the same have not been already repaid to them

or allowed to them in account with" third persons, such qualifying words being inserted at the instance of the plaintiffs. Kay was of opinion that the burden of proving repayment, or allowance in account, rested on the plaintiffs.

VOLUNTARY ASSIGNMENT OF LEASEHOLDS—VENDOR'S LIEN.

A very short point was involved in *Harris* v. *Tubb*, 52 Chy.D., 79, namely, whether an assignment of leaseholds in consideration of paternal love and affection was voluntary or not. Kekewich, J., on the authority of *Price* v. *Jenkins*, 5 Chy.D., 619, held that it was not voluntary, although confessing to considerable doubt as to the correctness of the decision. The theory on which the case proceeds is that an assignee of a lease comes under responsibility for the rent and performance of covenants. In this case the effect of the decision was to enable the assignee to cut out a vendor's lien, to which his assignor's interest was subject.

The Law Reports for October comprise 23 Q.B.D., pp. 373-413; 14 P.D., pp. 131-150; and 42 Chy.D., pp. 93-208.

SHERIFF—ACTION FOR TAKING DEFAULTING DEBTOR TO PRISON WITHIN TWENTY-FOUR HOURS OF ARREST—32 GEO. II., C. 28, S. 1—ARREST UNDER DEBTORS' ACT.

Mitchell v. *Simpson*, 23 Q.B.D., 373, was a case in which the plaintiff having been arrested by the sheriff by virtue of an order made under the Debtors' Act of 1869, for making default in payment of debt, brought the present action against the sheriff for carrying him to prison within twenty-four hours of his arrest, being, as alleged, contrary to the provisions of 50 & 51 Vict., c. 55, s. 14, which is a consolidation of the 32 Geo. II., c. 28, s. 1 (which is still in force in this Province). The question was, whether the order for arrest was "an attachment for debt," and the Divisional Court (Denman and Charles, JJ.) were agreed that it was not, but was that and something more, namely, a punishment for contumacious conduct; and therefore the sheriff need not wait twenty-four hours after the arrest before taking such a debtor to prison.

PRACTICE—DISCOVERY—LIBEL—ACTION AGAINST PROPRIETOR OF NEWSPAPER—ADMISSION OF PUBLICATION—INTERROGATION AS TO NAME OF WRITER OF ALLEGED LIBEL.

In *Gibson* v. *Evans*, 23 Q.B.D., 384, it was held by Lord Coleridge, C.J., and Hawkins, J., that in an action against the proprietor of a newspaper for libel, who admits the publication and pleads an apology, the plaintiff is not entitled to examine the defendant as to the name of the writer, unless the identity of the writer is a fact material to some issue raised in the case.

PRACTICE—LIBEL—PLEADING—PAYMENT INTO COURT WITH DEFENCE DENYING LIABILITY—ORD. XXII R. 1—(ONT. RULE 632)—EMBARRASSING DEFENCE.

Fleming v. *Dollar*, 23 Q.B.D., 388, is another libel action, in which a question of pleading is discussed. The defendant by his defence partly justified the alleged libel, but wound up his defence with an admission that the words were

not wholly justified by the facts, and paid into court 40/ in satisfaction of the plaintiff's claim. Lord Coleridge, C.J., and Hawkins, J., affirmed the order of Pollock, B., striking out this defence as being both embarrassing and contrary to Ord. xxii., r. 1, inasmuch as it left in doubt what the defendant justified and what he did not.

PRACTICE—WRIT OF SUMMONS—SERVICE—IRREGULARITY WAIVED.

Two or three points of practice come under consideration in *Fry* v. *Moore*, 23 Q.B.D., 395, which was an application by a defendant to set aside the service of the writ of summons and all subsequent proceedings, and it shows how careful it is necessary for a party to be who complains of an irregularity, not to take any step in the action which can be construed into a waiver of his right to object to it. In this case the plaintiff issued a writ for service within the jurisdiction, the defendant being at the time resident out of the jurisdiction; this the Court held was not of itself an irregularity, as the plaintiff might have waited until the defendant came within the jurisdiction and then served it; but instead of doing this he obtained an order for substituted service on the defendant's brother, which the Court held was an irregularity, the plaintiff's proper course being to have issued a writ for service out of the jurisdiction, inasmuch as the substituted service was to be effected whilst the defendant was abroad. The defendant not having appeared, the plaintiff signed judgment by default. The defendant having made two unsuccessful attempts to set aside the judgment, and to compel the delivery of a statement of claim, then made the present motion, and the Court of Appeal (Lindley and Lopes, L.JJ.) affirmed the order of Field and Cave, JJ., dismissing the application, holding that the two previous applications were a waiver of the irregularity.

MEDICAL PRACTITIONER—COUNCIL OF COLLEGE OF PHYSICIANS—JURISDICTION—REMOVAL OF NAME FROM REGISTER—POWER OF COURT TO REVERSE DECISION—MANDAMUS—LIBEL—PRIVILEGE—MEDICAL ACT (21 & 22 VICT., C. 90, S. 29)—(R.S.O., C. 148, S. 34.)

Allbutt v. *General Council of Medical Education*, 23 Q.B.D., 400, is a decision under the English Medical Act (21 & 22 Vict., c. 90, s. 29), which is similar in terms to our R.S.O., c. 148, s. 34. The Act in question empowers the General Council of Medical Education to keep a register of medical practitioners, and by s. 29 if any registered practitioner after due inquiry be judged by the Council to have been guilty of infamous conduct in any professional respect, the Council is empowered to direct the removal of the name of such practitioner from the register. The plaintiff had published a book for popular circulation, parts of which the Council, after due inquiry, at which the plaintiff was represented by counsel, considered detrimental to public morality, and its publication infamous conduct in a professional respect, and they ordered his name to be removed from the register, and the proceedings of the Council in the matter were published. The plaintiff claimed a mandamus to the Council to restore his name to the register, and damages for the publication of the proceedings, as being a libel on the plaintiff. The Court of Appeal (Lord Coleridge, C.J.,

and Lindley and Lopes, L.JJ.) upheld the decision of Pollock, B., at the trial, that—the *bona fides* of the Council not being impeached—the Council had the sole jurisdiction under the Act to deal with the matter, and the Court had no power to review their decision; and that the publication complained of was privileged, and therefore not actionable.

SALVAGE—AGREEMENT—SUPERVENING CIRCUMSTANCES PUTTING AN END TO AN AGREEMENT.

In *The Westbourne*, 14 P.D., 132, the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.) affirm a decision of Butt, J. The master of a vessel in a helpless condition made an agreement with the master of another vessel to tow the vessel in distress to Gibraltar for £600, the latter vessel to supply the hawsers. The weather became worse, and all the hawsers except one broke, and it became impossible to proceed to Gibraltar. The towing vessel therefore took the disabled vessel to the nearest safe port. Under these circumstances the Court held that the original agreement was put an end to by the act of God making it impossible of performance, and that the salvors were entitled to be remunerated as though no such agreement existed, and £900 was awarded.

SHIP—DAMAGE—WHARF—OBSTRUCTION IN BED OF RIVER—NEGLIGENCE.

The Calliope, 14 P.D., 138, is a decision on the same lines as that in *The Moorcock*, 14 P.D., 64, noted *ante* p. 362. In this case goods were consigned in the plaintiff's vessel to defendants, who were proprietors of a wharf on the river Usk, and lessees of part of the bed of the river in front of the wharf. There were two berths to the wharf, and in the space between the two berths a ridge of sand had been allowed by the defendants to accumulate, and on which the plaintiff's vessel, in approaching the wharf, struck upon, and was damaged. It was held by the Court of Appeal (Lord Esher, M.R., and Cotton and Lindley, L.JJ.) overruling Butt, J., that the defendants were liable for the damage.

BILL OF LADING—DELIVERY OF GOODS WITHOUT PRODUCTION OF ONE OF THE PARTS OF THE BILL OF LADING—FOREIGN LAW.

In *The Stettin*, 14 P.D., 142, Butt, J., held that a ship-master delivering goods to the consignee named in the bill of lading, without requiring him to produce one of the parts of the bill of lading, is guilty of a wrongful delivery, and that the owners and charterers are liable for the damages occasioned thereby. In this case foreign lawyers were called to prove the law of Germany on the point, and they differing in opinion, Butt, J., decided what, upon the evidence, the German law was.

APPOINTMENT—SPECIAL POWER—GENERAL DEVISE—WILL NOT REFERRING TO POWER—WILLS ACT (1 VICT., C. 26, SS. 24, 27)—(R.S.O., C. 109, SS. 26, 29).

In re Williams, Foulkes v *Williams*, 42 Chy.D., 93, a testator, having a special power by will to direct the trustees of certain real estate to pay the income to his wife for life, and having no real estate of his own, made a will whereby he devised and bequeathed all his estate, real and personal, to his wife

absolutely. The will contained no reference to the power, and the question was whether it could be deemed an execution of the power; and it was held by Kay., J.,that it could not, and this opinion was affirmed by the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.); s. 27 of the Wills' Act (R.S.O., c. 109, s. 29), the Court held, did not apply, because the power was not a general one, but a special power, and the fact that the testator had no real estate was held to be no reason for assuming that he intended to execute the power, because as a will now speaks from the death of the testator, though he may have had no realty at the time of its execution, he may have contemplated the possibility of having some before he died.

COMPANY—SHARES—ISSUE OF SHARES AT A DISCOUNT—DEALING WITH SHARES BY HOLDER—MISTAKE OF LAW—ACQUIESCENCE.

In re Railway Time Tables Co., 42 Chy.D., 98, was an application by an allottee of certain shares in a company, to be relieved of liability in respect thereof, under the following circumstances. The company offered to allot to, and Mrs. Sandys agreed to accept 673 £5 shares of the company at a discount of £4 10s. per share. She accepted the shares in January, 1887, and paid therefor 10s. per share, and was duly registered as a shareholder in respect of the shares. She sold 150 of them in March, 1887, as fully paid up shares, and in April and August, 1887, she attempted to alienate some of the rest. In December, 1887, the validity of issuing shares at a discount was doubted by the Court of Appeal in the case of *In re Adlestone Linoleum Co.*, 37 Chy.D., 191. In January, 1888, Mrs. Sandys applied for, as a shareholder, and sent to the company, proxies in respect of the 523 shares she retained. In February, 1888, she wrote to the company that she had been advised that the issue of shares at a discount was illegal, and if they attempted to make a further issue at a discount she would apply to restrain them. In June, 1888, she applied to the company to pay back the amount she had paid for the 673 shares, and remove her name from the list of shareholders in respect of them. In September, 1888, she took back the 150 shares she had sold in exchange for 150 fully paid up shares, and in November, 1888, she applied to the Court to strike her name out of the list of shareholders in respect of the 673 shares. The application came before Stirling, J., who held hat she was entitled to be relieved in respect of 523 of the shares, but as to the 150 shares, he held that as they had been sold to a purchaser for value without notice, the purchaser would be entitled to hold them as fully paid up shares, and that Mrs. Sandys would be entitled to hold them on the same terms, and therefore as to these shares she was entitled to no relief. The company appealed as regarded the 523 shares, and the Court of Appeal (Cotton, Lindley and Bowen, L.JJ.) were unanimously of opinion that she was bound to keep the shares, and pay the full amount of each share; that the liability arose not from contract, but by virtue of the statute, which, on her acceptance of the shares and dealing with them as her own property, imposed the legal liability to pay the full par value of the shares, from which her mistake of law as to her liability could not relieve her. The decision of Sterling, J., on this point was therefore reversed.

LUNATIC—PROMISSORY NOTE PAYABLE BY INSTALMENTS GIVEN BY SANE PERSON SUBSEQUENTLY BECOMING LUNATIC IN SATISFACTION OF A MORAL OBLIGATION—PAYMENT OF UNPAID INSTALMENTS.

In re Whitaker, 42 Chy.D., 119, reveals a somewhat curious and unusual state of facts. A gentleman of large estate made his will in 1878, whereby he gave all his real and personal estate, which was worth £400,000, to Stephen Whitaker. Shortly after making this will, the testator gave it to his agent, with whom it remained until August, 1885, when he took it away, saying he wished to alter it. On 10th October, 1885, he was seized with an attack of *angina pectoris*, and died on 11th October. After his death, with the will of 1878 was found a second will unexecuted, entirely in the testator's writing but bearing no date except 1885, whereby he gave all his estate to one Holden. After his seizure and after he had rallied slightly, the testator told his medical attendant that he had a little business he wished to transact, but the doctor advised him to wait till the morning, and it was believed that the business he referred to was the execution of the unsigned will. After the testator's death Whitaker saw Holden, and in the presence of his own solicitor told him of the existence of the unsigned will, and that he intended to give Holden some substantial benefit. He subsequently sent him a promissory note for £50,000, payable by instalments. After £15,000 had been paid on account of the note, Whitaker became lunatic, and this was an application for the payment of the balance of the note out of the lunatic's estate. The Court of Appeal (Cotton and Lindley, L.JJ.) were agreed that although the promissory note constituted no legal obligation against the lunatic's estate, and therefore that the holder was not a creditor, yet that it constituted a good moral obligation, which the Court in its discretion could authorize to be paid. They, however, held, that the application should have been made by the committee, and that he must be joined as a co-petitioner, and that the wife of the lunatic must consent—which being done, the payment was sanctioned.

Correspondence.

POWER OF DISALLOWANCE.

To the Editor of THE CANADA LAW JOURNAL:

DEAR SIR,—In what you say in your last number of the great usefulness and value of Dr. Bourinot's lectures I perfectly agree; they well deserve to be made a text-book on the subjects to which they relate, and ought to be in the hands of every student of the profession of the law, and, indeed, of every citizen who wishes to know his rights and duties as such, and the admitted lawyer will find it worth while to have them at hand for reference. They state very clearly the constitutional law on non-doubtful points, and on doubtful ones they offer comments and suggestions wisely and lucidly thought out, and aidful towards their solution. I can hardly think you right in supposing that Dr. Bourinot favours the doctrine that the power of disallowance of Provincial Acts should be exercised only in cases where the powers of the provincial legislature are exceeded, though I agree that the power in question should be exercised with the utmost caution and regard for provincial rights. I observed in a late number of *The Week* something like

the doctrine to which you suppose Dr. Bourinot leans, but adopting it rather more decidedly than you suppose the Doctor to do, and, indeed, maintaining that disallowance should never be resorted to except when the disallowed Act is *extra vires;* and in some papers I have seen a like opinion expressed, accompanied with an intimation that our Premier had adopted it. I do not think this doctrine correct, and I think Sir John repudiated it in his speech at the laying of the corner stone of a Methodist church, and said, as the writer of the article in your journal does, and as I humbly follow them in believing, that the power of disallowance was intended to be exercised whenever the Provincial Act contained any provision inconsistent with the safety, honour or welfare of the Dominion; as, for instance, repudiation of a provincial obligation or contract, or any provision inconsistent with justice or morality. To confine an exercise of this power to cases where the Act is *extra vires* would make it superfluous and useless, for the Act would be void to all intents and purposes, and might be so declared by any court before which its illegality should be pleaded, at any time after its passing, and although it should have been sanctioned without objection. It might, of course, be disallowed, and its disallowance desirable to avoid doubt, delay and litigation; but the intent of the disallowance provision in the constitutional Act was not merely to stop the unlawful assumption of power by the Provinces, which the courts could do, but to prevent the abuse of the powers vested in them but exercised to the detriment of the Dominion. I think this power of disallowance is rightly vested in the Governor, acting by and with the advice of an Executive Council, under the virtual control of the Dominion Parliament, in which all the Provinces are represented, rather than in any court, which could only have determined the legality of an Act questioned, and not its policy and effect on the Dominion generally. Vested as it now is, I hold the power of disallowance to be useful, and indispensable to the conservation and welfare of the Dominion.

W.

Notes on Exchanges and Legal Scrap Book.

THE LAWYER'S ADVICE.—A good case of outwitting a fraudulent bailee is given by Mr. Uttley in the *Law Journal:* "Many years ago, a farmer having occasion to spend some days at an inn, asked and obtained leave from the inn-keeper to deposit with him a sum of money, amounting to one hundred pounds, for greater safety and security. When the time came to depart, the farmer naturally asked his host for the return of the money deposited with him. The landlord, however, evinced much surprise at the request, and vowed there must be some mistake, and that the money must have been entrusted to some one else. There being no receipt, nor any witnesses of the transaction, the farmer felt that he could do nothing. Subsequently meeting a friend and relating the facts of the case to him, he was advised to consult an attorney. The lawyer, after listening to his recital of the facts, thereupon, to his great amazement, advised him to return to the inn-keeper, take his friend with him as a witness,

and deposit another hundred pounds. The farmer did as he was bid, and then called on this lawyer to report the fact. That gentleman then told him to go alone to the inn-keeper and ask him for the hundred pounds. The farmer did so, and got it, but was as puzzled as ever, there still being a hundred pounds in the inn-keeper's possession. The lawyer, however, on being informed of the safe receipt of the money, next instructed him to take his friend with him and demand from the inn-keeper the hundred pounds which had been deposited in the witness's presence. Boniface, of course, protested and swore that the money had been repaid, but the presence of the witness silenced him, and the farmer got his money. A remarkable instance this of reposing confidence in your lawyer, and benefiting by his shrewdness and sagacity."

CITATION OF AMERICAN DECISIONS IN THE ENGLISH LAW COURTS.—In our own courts American decisions are frequently cited in cases where the point is not covered by our own or English decisions, especially on questions of municipal and corporation law. The subject of how far such decisions are to be followed has attracted the attention of the English Court of Appeal, and we cite the following remarks on the subject from the *Solicitor's Journal*:—"In the course of the hearing of a case before the Court of Appeal, No. 2, on Wednesday, the Lord Chancellor took occasion to observe that the practice of citing American decisions in our courts as if they were of binding authority was growing to an extent to which he, for one, could not assent. Those decisions were worthy of all respect as expressing the opinions of very learned lawyers on analogous questions, but they could not be quoted as decisions binding our courts on questions of English law. The Lords Justices (Cotton and Fry) joined in protesting against this mode of citation of American decisions. We believe that a similar protest was recently made by Lord Justice Fry, in Court of Appeal No. 1, on the occasion of the hearing of an important appeal which turned to a great extent upon the law of conspiracy. On that occasion a great number of American decisions were, however, cited without objection on the part of the other members of the court. We rather think that the practice to which the Lord Chancellor alluded owes its origin to the rapidly increasing practice of citation of American authorities by text-book writers. Since the late Mr. Benjamin, Q.C., in the first edition of his work on 'Sale of Personal Property,' published in 1868, inserted copious references to the decisions of the courts of his own country, as he modestly phrased it, 'in order to afford some compensation for the imperfections' of his book, but also, no doubt, with a view of rendering it useful on both sides of the Atlantic, the custom of giving American authorities in text-books has very largely increased, and American cases now find their way into English digests. A few years after Mr. Benjamin's treatise appeared, we remember discussing the subject of utility of American decisions to the advocate in English courts with a member of the common-law bar, now a distinguished judge in India, whose practice lay largely in a branch of the law upon which the decisions of the United States courts are specially valuable. 'Do I use them?' he said; 'yes, I use them con-

stantly. When I want an argument I go to the American reports, and very frequently I find in the judgments what I want. But of course I don't cite the cases as authorities.' From this it was an easy stage to citing the decisions as on the same footing as a view expressed in a work by Lord St. Leonards or Mr. Dart would be cited in the Chancery Division—that is to say, as the opinion of lawyers of exceptional learning and experience. But latterly it would appear that the practice has arisen of citing the decisions of American and English courts indiscriminately as if they were equally binding on questions of English law. This is, of course, an error; but we conceive that the error lies in the mode of citation, not in the citation itself. Most English lawyers know that there are probably no decisions upon which more anxious deliberation is bestowed than those of the Supreme Court of the United States, and the opinion of that court on a point not yet covered by English authority is entitled to, and would doubtless receive the most respectful consideration from any of our judges. The matter to which the observations of the Court of Appeal were addressed was, we conceive, merely the citation of American authorities as binding on English Courts. It may be remembered that in *Steel* v. *Dixon*, 17 Chy.D. 825, in which an important and novel point on the law of suretyship arose, Lord Justice Fry (then Mr. Justice Fry), while holding that the point was governed by the principle established by the well known case of *Dering* v. *Earl of Winchelsea*, 1 Cox 318. added, that in coming to this conclusion, as he did upon principle, he was much strengthened by the American authorities to which his attention had been called by counsel, and he mentioned Mr. Justice Story's Equity Jurisprudence, and read passages from the judgments of American courts. We can hardly suppose that the learned Lord Justice has completely altered his estimate of the weight which is to be attributed to American decisions."

THE BEST HUNDRED LAW BOOKS.—A writer in the *Irish Law Times* suggests that it would be a very useful thing if some one would prepare a concise and comprehensive list of good law books, including such works as would be most necessary for the general practitioner. "The list," he adds, "should, according to my view, include the leading and most reliable standard works on the different branches of international, constitutional, criminal, property, commercial and maritime law, the best books on practice and specialty subjects, and to be brief, the best of the many treatises which exist, but are only to be accidentally met with—not always when they are wanted—on the miscellaneous subjects turning up from day to day in the course of business. Such a list need not necessarily contain, or be confined to, a hundred books, but that seems to be the fashionable number in those matters, and in the present instance is not, perhaps, too ample, though it may be the reverse. If you think my hint worth any consideration, you may be kind enough to initiate a list, and you could hardly be troubled with very much discussion on the subject of it. Before concluding, you will let me add that I feel a difficulty such as Byron had in offering a translation of the 'Romaic expression of tenderness' occurring in 'Maid of Athens.' Many of

your readers may, and justly, consider they do not stand in need of instructions as to what their office shelves should contain in the shape of legal literature, and may be affronted at anything like the shadow of a suggestion that they do. 'For fear of any misconception,' therefore, as the poet said, I will remark that my list will not be for them, but for students like myself who are open to a little light and leading, and who frequently fail to find it in libraries."

In a recent number of the *Columbia Law Times* Professor Theodore Dwight, of the Columbia Law School, gives the following list of "Fifty Leading Law Books," which he thinks will be useful to a young practitioner in commencing a law library. "Being limited to that number, I have failed," he remarks, "to include many highly valuable works. These are not to be regarded as disparaged because they are not named. I have been guided frequently in making the selection by practical considerations, and equivalent books might have been suggested. I have not aimed to mention ordinary text-books used in the law school, and have omitted digests, which are indispensable, as well as reports. The various valuable collections of leading cases are not embraced in the list.

"*List of Books.*—Holland's Elements of Jurisprudence (3d ed.), Revised Statutes of the United States, Revised Statutes of the Practitioner's State, Kent's Commentaries, Schouler on Personal Property, Pollock on Contracts, Addison on Contracts, Story on Agency, Daniel on Negotiable Paper, Reeves' Domestic Relations, Smith on Master and Servant, Bishop on Marriage and Divorce, Bishop on Married Women, Tyler on Infancy, Morawetz on Corporations, Dillon on Municipal Corporations, Angell and Ames on Corporations, Sugden or Dart on Vendors and Purchasers, Benjamin on Sales (Corbin's or Bennett's ed.), Taylor on Landlord and Tenant, Burge on Suretyship, Story on Bailment, or Schouler on Bailment, Redfield on Railways, Story or Wharton on Conflict of Laws, Abbott on Shipping, Arnold on Marine Insurance, Phillips on Insurance, May on Fire and Life Insurance, Dwarris on Statutes, Browne on Statute of Frauds, Angell on Statute of Limitations, Mayne on Damages, Sedgwick on Measure of Damages, Kerr on Fraud and Mistake, Bigelow on Estoppel, May (H. W.) on Fraudulent Conveyances, Lindley on Partnership, Parsons on Partnership, Pomeroy's Equity Jurisprudence, High on Receivers, High on Injunctions, Perry on Trusts, Lewin on Trusts, Williams on Real Property, Jones on Mortgages, Washburn on Easements, Rawle on Covenants, Jarman on Wills, Humphrey's Precedents, Taylor on Evidence, Stephens on Evidence (Chase's ed.), Gould on Pleading, Daniel's Chancery Pleading and Practice."

A MANAGER stole certain negotiable securities from his employers and sold them to X., who paid value, and who was innocent of the fraud. Afterwards the manager obtained by fraud from X. a portion of the original bonds and some other bonds of a like kind and corresponding value. These bonds were returned to the employers, who knew nothing of the whole transaction. Can X. sue the employers and recover the bonds?

This is the case of *The London and County Banking Company* v. *The London and*

River Plate Bank, L.R. 20 Q.B.D. 232, and L.R. 21 Q.B.D. 535; 61 L.T. Rep. N.S. 37, and is discussed in the last number of the *Harvard Law Review*.

The question as a point of extreme legal nicety is an interesting and difficult ne. "It is absolutely new, and must be decided on principle," remarks Lord Justice Lindley. The Court of Appeal holds that the defendants, *i.e.*, the employers, have given value for the bonds, and so can retain them. The value given is this: the defendants have lost a right to sue the manager for conversion by accepting from him the bonds in question. The right to sue for the conversion of the bonds has been exchanged for the bonds themselves. Acceptance of the bonds by the defendants is presumed, because "it would be contrary to human nature to suppose that the defendants would not have kept the bonds they had known of their theft from themselves, and of their restoration; and we know as a fact that the defendants have insisted on their right to retain the bonds ever since they discovered the theft." There is the analogous doctrine that the acceptance of a gift is presumed, 3 Co. Rep. 25 a; 31 Chy.D. 282, even when the gift is of an onerous nature, 5 El. & Bl. 367, at p. 382. This is the argument of Lord Justice Lindley. Lord Esher, M.R., seems to regard acceptance as immaterial, for he says: "When they restored them they lost their right, for how could they bring an action for the conversion of instruments which were in their own possession? I am of the opinion that the destruction of this right of action is a value moving from them, and that it is immaterial they did not know what they were doing." No direct authority is cited by either Lord Justice.

The cases of *Thorndike* v. *Hunt*, 3 DeG. & J. 563 (1859), and *Taylor* v. *Blakelock*, L.R. 32 Chy.D. 560 (1886), however, both seem to support this doctrine. In the former case a trustee misappropriated part of one trust fund, and being called on to account and pay into court the amount of the trust, he fraudulently misapplied part of another trust fund to make good the deficiency; the court decides that the *cestuis* of the first trust estate can retain the proceeds of the second misapplication, because they have given value; *i.e.*, "There was a debt due from the trustees; they were called on to pay it, and if it had not been paid, they would have been liable to execution." The latter case is quite similar. One Carter was a trustee with the plaintiff under a will, and also trustee with the defendant under a settlement. Carter misappropriated part of the settlement fund, replacing, however, what he had taken by a corresponding portion of the will fund. Carter then died. It was *held* that the trust funds should not be disturbed; the defendant is a purchaser for value, because "in taking payment he relinquishes the right for the fruition of the right."

There seems to be no real distinction between the cases just cited and *The London and County Banking Co.* v. *The London and River Plate Bank*. The values, to be sure, given in the former cases are equitable *choses in action*, while the value given in the latter case is a legal right to sue for the tort. This, it is believed, is no reason for distinguishing the principles of the two decisions.

"It is," says Bacon, V.C., in *Taylor* v. *Blakelock*, L.R. 32 Chy.D. p. 565, "one of those painful cases in which, as between two innocent persons, a loss having

been sustained, the court is to decide upon whom that loss shall fall." Why not let the loss lie where it falls?

LEGAL EDUCATION.--This subject is at the present time attracting attention in England as well as in Ontario. Dissatisfaction is expressed with the methods provided by the Council of Legal Education for the instruction of students for the Bar. The lecture system is criticised as being too theoretical, disconnected, and lacking in thoroughness—the time at the disposal of the lecturers not admitting of more than a dry outline sketch of the subjects of which they treat. Lord Justice Lindley, in his recent inaugural address before the Law Department of Owens College, made some suggestive remarks on the subject. "Law," he said, "was a subject which affected everybody, and everybody ought to know something about. As law related to conduct, they would see that it was a branch of the larger subject of ethics. There was in the human breast a sense of duty, a sense of obligation, and it was upon this that law was built. The subject was so vast that it would be impossible in the space of a few minutes to give even an outline of it. He would say something of the materials for the study of the law, the method of study, and something about the law as a profession. Taking, then, law to be the aggregate of the rules of conduct enforced by the State, the first question was, where were they to be found. They were not to be found in a pocket volume of 500 pages. A book which proposed to make every man his own lawyer would soon take him in trouble to his solicitor. The law was to be found in Acts of Parliament, running back to Magna Charta, and it was to be found in legal decisions filling volumes upon volumes. But a student of law was not to be appalled by the masses of books he found in a law library. Nine-tenths of them he would never have occasion to consult. If any human being could see at the outset of his life all the potatoes and mutton chops he would have to eat before he died he would stand appalled. So if a law student supposed he would have to master all the books he saw in a law library, he would not only be appalled, but he would be making a very serious error. Principles were what he had to master to acquire the 'legal mind' which enabled him to solve difficulties as they arose. Good law books which put the raw materials in a readable shape would help immensely. To him the law was an engrossing subject, because a succession of puzzles or problems arising out of human conduct. It was by no means a dry subject, but one eminently calculated to stimulate inquiry and awaken every faculty a man had. But law must be studied as a science. They must not only know the rules but know the reason for them; simply to burden the mind with rules was of no use toward making a man a lawyer. The subject was to be studied in the same way as they studied other subjects—inductively and deductively. The mechanical part of the subject could be learned only in the office of a solicitor or the chambers of a barrister. But an articled clerk would find his knowledge of little use to him without the extra culture he could obtain from the college lectures. He would advise all articled clerks to attend the college lectures, and he would also advise all other

persons who took an interest in law to do the same. He strongly condemned the system of cramming. The one good thing about cramming was that it cultivated a habit of close attention, without which a man would not be good for much in the legal profession. To master his subject the student must get hold of general principles, and he could not do this by cramming. He would be the last person to say that a man could become a lawyer by attending lectures. One might as well say that a man could become a shoemaker by studying the anatomy of the foot. The principles expounded in the lectures must be applied in the offices of legal practitioners. Unless they combined the two things they could not expect to make headway in their profession. It was said that the law was 'going down,' that it was not what it used to be, and that it was hardly worth entering upon. He believed that was an entire mistake. There never was a time when so much was done to render the law free from technicality and to make good sense and reason and love of truth prevail. Technicality after technicality was being brushed away with a rapidity only known to those who closely observed the process. If one went into a court of law and listened to an argument he would seldom find himself bewildered now by technicalities. What he would see was a desire first of all to get at the facts, and then to apply the law. Subtleties were laughed at now that would have been listened to twenty-five years ago. What was the ground for saying that the law as a profession was not what it used to be? So far as he knew, it was that owing to recent changes it was found that a great deal of work which used to be done by rising barristers could now be done by solicitors' clerks. The public, he thought, were entitled to the benefit of this discovery. But apart from this he saw no sign whatever that the law was in any sense going down. On the contrary, he saw signs everywhere that it was becoming a nobler and nobler profession; and it could not fail to progress in that direction so long as there was a desire to discredit technicalities and pursue truth and justice, come what might. He wished to give the young men he saw before him the benefit of a long experience not only as regards their studies but as regards their conduct in life. First of all he would say, let them throw their whole soul into their profession. A man who did not do that was not worthy of it. To succeed in the law a man must make it part of his religion. He did not know of any instance where a man who had done that had failed. Another thing was that they should never do anything when they were angry. If they wrote a letter when they were angry it would probably recoil on their own heads. If at the bar they lost their temper, they not only disarmed themselves, but put a double-edged sword in the hands of their opponents. They must never advise a client till they had a full knowledge of the material facts in the case, and they ought never to advise an appeal the day they were beaten. He regarded the study of the law as part of a liberal education, whether the student meant to go in for the law as a profession or not. Every young man ought to know something of the laws of the country in which he lived. And the more democratic the country became the more essential was this. In particular he recommended the study of the history of the country since the Reform Bill of 1832, since which time England had become more and more democratic."

AGENT OR CONTRACTOR.—In *Rogers* v. *Florence R. Co.*, South Carolina Supreme Court, defendant made a contract with H., a railroad contractor, for the grading of a section of its road, by the terms of which H. was to employ and pay the laborers, and do the work subject to the approval of defendant's engineer; to increase the force of laborers whenever required by the engineer; to discharge any laborer who might be offensive to defendant. If he failed to complete the work within the time stipulated, defendant was authorized to employ laborers and complete it at his expense. He agreed to remove or burn up all trees, logs, and other perishable material along the line of the road, and to be responsible for damages as between himself and defendant. Defendant's assistant-engineer was to personally direct the execution of the work.

Held, that H. was an independent contractor, and not an "authorized agent or employee" of defendant, within the meaning of the statute making railroad companies liable for damages by fires. The court said: "We have examined the numerous cases referred to by the counsel, and while there are expressions in many of them, and decisions which seem to sustain respondent's view of this contract, yet we think at last each case must rest on its own facts, with the conceded doctrine overhanging all the cases that the question of liability depends on the fact whether the company is doing the work, or whether it is being done by an independent contractor. Here we think in this case that Mr. Hardin was an independent contractor. It is said, however, that there are certain exceptions to the rule above, under one of which the case may be brought. . . . The second exception claimed to the general rule above is 'that the employer is liable where he does not release the entire charge of the work to the contractor, but retains supervision of its construction.' This is nothing more than saying that where the contractor is not an independent contractor, but is under the control of his employer, the employer is liable. In other words, instead of its being an exception to the admitted doctrine above, it seems to be nothing more than stating it in different phraseology; or rather, while recognizing the doctrine it states a certain condition where the employee would not be an independent contractor, to wit, where the employer had not released the entire charge of the work to him, etc. In *Railroad Co.* v. *Hanning*, 15 Wall. 649, this matter is fully discussed, both in the opinion of Mr. Justice Hunt, and in a note attached; and without incumbering this opinion with a discussion of the character of the control reserved, which will hold the employer responsible, we may say that no such control was reserved here. See the case of *Railroad Co.* v. *Hanning, supra*, the numerous cases there cited in the opinion, and the notes. The reserved control, to have that effect, must be both general and special, and not only as to what work shall be done, but also how it shall be done. See *Hughes* v. *Railroad Co.*, 15 Am. & Eng. R. Cas. 101, and notes attached. See also *Lesher* v. *Navigation Co.*, 56 Am. Dec. 495; *Bailey* v. *Mayor, etc.* 38 ib. 669; *Hilliard* v. *Richardson*, 63 id. 743, and the notes. The liability depends upon the fact whether the party is an independent contractor or an agent and servant of the company, which must be ascertained from the facts of each case."—*Albany Law Journal.*

DIARY FOR NOVEMBER.

1. Fri.....All Saints' Day. Sir Matthew Hale born 1609.
2. Sat.....Last day for filing papers and fees for Final Exam.
3. Sun.....*Twentieth Sunday after Trinity.* O'Connor, J.Q.B.D., died 1887.
5. Tues...1st Intermediate Examination.
7. Thu.....2nd Intermediate Examination.
9. Sat.....Prince of Wales born, 1841.
10. Sun.....*21st Sunday after Trinity.* J.H. Hagarty, 12th C.J. of Q.B, 1878. Richards, 10th C.J. of Q.B., 1868. J.
12. Tues...Court of Appeal sits. Solicitors' Exam.
13. Wed...Barristers' Examination.
14. Thu.....Falconbridge, J., Q.B.D., appointed 1887.
15. Fri.....Sir M. C. Cameron, J., Q.B., 1878. Macaulay, 1st C.J. of C.P, 1849.
17. Sun.....*22nd Sunday after Trinity.* Lord Erskine died 1823, æt 78.
18. Mon....Mich. Term commences. High Court Justice Stttings begin.
19. Tues...Armour, J., gaz. C.J., Q.B.D., 1887. Galt. J., gaz. C.J., C.P.D., 1887.
21. Tues...J. Elmsley, 2nd C.J. of Q.B., 1796. Princess Royal born, 1840.
24. Sun.....*23rd Sunday after Trinity.*
25. Mon.....Marquis of Lorne, Governor-General, 1878.
30. Sat.....Moss, J.A., appointed C.J. of Appeal, 1887. Street, J., Q.B.D., and McMahon, J., C.P.D., appointed, 1887.

Early Notes of Canadian Cases.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Div'l Ct.] [June 22.

LOUIS ROUTHIER *v.* MCLAURIN.

Malicious prosecution — Reasonable and probable cause—Information for assault—Justification for assault—Misdirection—New trial.

The defendant laid an information against the plaintiff for assault, which the magistrate dismissed on the ground that the title to land came in question. It appeared that the defendant had come upon land of which the plaintiff's father was in actual possession, for the purpose of removing some wood, so as to give possession to one to whom he had assumed to sell the land. There was a scuffle, and the defendant was put off the premises.

At the trial of this action, brought for malicious prosecution, there was contradictory evidence as to what part the plaintiff took in the scuffle, and whether he laid hands on the defendant.

The trial judge asked the jury to say whether the plaintiff made an assault on the defendant on the occasion, and told them that if they answered "yes," they need not go any further for that would end the case. They answered "yes," and judgment was entered for the defendant.

Held, that there was misdirection; the answer was not decisive of the question whether there was reasonable and probable cause for laying the information; and the plaintiff was entitled to have the circumstances relied on as justification for the assault submitted to the jury, and to have their finding as to whether the defendant was conscious when he laid the information that he had been in the wrong. A new trial was ordered.

Hinton v. *Heather*, 14 M. & W., 131, followed.

Fulton v. *Johnstone*, 1 T. R., 493, distinguished.

Watson for the plaintiff.

Shepley for the defendant.

Common Pleas Division.

Div'l Ct.] [June 29.

DABY *v.* GEHL.

Division Court judgment—Transcript to District Court—Issuing fi. fa. lands without fi. fa. goods—Sale under expired writ—Sale after return of fi. fa. lands under ordinary fi. fa. instead of alias fi. fa.—Estoppel—Payment.

A transcript of a Division Court judgment was obtained to the District Court of the Thunder Bay District.

Held, that it was not necessary to issue a *fi. fa.* goods from such District Court before a valid sale could take place under a *fi. fa.* lands issued therefrom.

Lands were sold under a *fi. fa.* lands after the expiry of a year, and a deed executed by the sheriff. The deed recited that the writ had been duly renewed, but neither the sheriff's nor the district clerk's books showed any such renewal.

Held, that no renewal was proved, and the sale was invalid.

Subsequently writs of *fi. fa.* goods and lands were issued on the judgment, the former being returned *nulla bona*, and a sale was made under an ordinary writ of *fi. fa.* lands and a deed executed by the sheriff.

Held, that the fact of an ordinary *fi. fa.* lands being issued instead of an alias *fi. fa.*, and the

advertisement being as if the proceedings were initiatory proceedings towards effecting a sale of defendant's lands, would not of itself invalidate the sale.

In 1886 the now defendant commenced an action against the present plaintiff and others to set aside the first sheriff's deed, which was dismissed for want of prosecution.

Held, that the defendant was not thereby estopped from setting up the invalidity of the sheriff's sale, for there was no determination of this matter and no final judgment of the Court pronounced on the matters now in issue.

Held, also, that under the circumstances, the defendants could not set up that the proceedings under the expired writ constituted a payment of the execution debt.

Delamere for plaintiff.

Cattanach for defendant.

Div'l Ct.] [June 29.

CARTY *v.* CITY OF LONDON.

Accident—Municipal corporations—Want of repair of street—Contract with street railway company to keep in repair—Liability of corporation—Remedy over against street railway company—Evidence of contributory negligence.

By 36 Vict., c. 99 (O.), the London Street Railway Company was incorporated, by sec. 13 of which the City of London were authorized to enter into an agreement for the construction of the railway on such of the streets as might be agreed on, and for the paving, repairing, etc., of the same. By sec. 14 the city was also empowered to pass by-laws to carry such agreement into effect, and containing all necessary provisions, etc., for the conduct of all parties concerned, including the Company, and for enforcing obedience thereto. A by-law was passed by the city providing for the repair of certain portions of the streets by the Street Railway Company, who were to be liable for all damage occasioned to any person by reason of the construction, repair, or operation of the railway or any part thereof, or by reason of the default in repairing the said portions of the streets, and the city should be indemnified by the company for all liability in respect of such damage.

An accident having happened to plaintiff by reason of said portions of said streets being out of repair, an action was brought by the plaintiff against the City of London therefor. After action was brought, and more than six months after the occurrence of the accident, on the application of the City of London, the Street Railway Company were made party defendants.

Held, that, notwithstanding the said legislation, by-law and agreement, the city was liable under sec. 531 of the Municipal Act, R.S.O., c. 184, to the plaintiff for the damage he had sustained; but that the city was entitled to have a remedy over against the Street Railway Company.

Held, also, following *Anderson* v. *Canadian Pacific Railway Co.*, ante p. 479, that the six months' limitation clause in the Railway Act, did not apply, the question being one of contract.

Osler, Q.C., and *Marsh* for plaintiff.

Meredith, Q.C., for the defendants, the City of London.

Robinson, Q.C., and *Flock* for the defendants, the London Street Railway Company.

Div'l Ct.] [June 29.

SMITH *v.* SMITH.

Will—Life estate—Annuity—Costs—Consolidation of mortgages.

The testator by his will made a provision for his wife as follows: "I give and devise to my beloved wife," etc., "all household goods," etc., for the term of her natural life; and I give and devise to her one bedroom and one parlour of her own choice in the dwelling house wherein I now dwell;" etc., "also the use of the kitchen yard garden; also I give and devise to my said wife her life in the said lot heretofore mentioned, also an annuity of $20 yearly." He then, subject to the above and to the payment of $1,000 to his eldest son, D., and other legacies, devised the lot to his second son, J.

After the testator's death the plaintiff, the widow, and J. lived on the lot, arranging between them as to her maintenance. In order to raise money to pay D.'s legacy, the plaintiff and J. mortgaged the lot to a building society, and in default proceedings were taken under the power of sale to compel payment. The plaintiff set about making arrangements to pay off the mortgage, but the company refused to accept payment unless the amount of two other

mortgages made by J. alone were also paid. No tender was made by plaintiff, nor any demand made for arrears of annuity or dower. An action was brought by plaintift to establish the will and to have the rights of the building society declared.

Held, that the proper construction of the will was that the widow was to have a life estate in the bedroom and parlour she should select and also in the kitchen yard garden, and also the annuity of $20; and that the building society could not claim to have the mortgages consolidated, and that as the plaintiff had not made any tender to the building society she could not claim her costs, but it was directed in lieu of her paying costs the arrears of annuity and dower should be wiped out.

Osler, Q.C., and *Follinsbee* for the plaintiff.
Meredith, Q.C., for the defendant.

Div'l. C't.] [Sept. 7.

REGINA *v.* HENDERSON.

Conviction—Carrying on "petty trade"—Evidence of.

The defendant, a wholesale and retail dealer in teas in the county of W., where he resided, went to the county of H. and sold teas by sample to private persons there, taking their orders therefor, which were forwarded by him to county of W., and the packages of teas subsequently delivered, all the packages being sent in one parcel to H. county and then distributed. The defendant was convicted under a by-law passed under R.S.O., c. 184, sec. 495, sub-sec 3, par. (*a.*) and (*b.*), for carrying on a petty trade without the necessary license therefor.

Held, that the conviction could not be sustained and must be quashed.

McGibbon, of Orangeville, for the applicant.
Kappelle contra.

Div'l Ct.] [Sept. 7.

REGINA *v.* HIGGINS.

Canada Temperance Act—Village joined to another county for municipal purposes—Jurisdiction of Justices of county within which village situated—Conviction differing from minute of conviction—Validity of.

The defendant was convicted by two Justices of the Peace of the District of Muskoka for a breach of the 2nd part of the Canada Temperance Act, for selling liquor in the village of B. in the district of M. The Act was in force in the village of B. only by reason of its being no municipal purposes within the county of V., within which county the Act was in force, there being no evidence to show that the Act was in force in the district of M., within which B. was situated.

Held, that the Justices of the Peace of the M. district had no jurisdiction to convict the defendant, for he could only be convicted by Justices of the Peace whose commissions lay within V. county.

The adjudication and minute of conviction did not award distress, but provided that in default of payment forthwith of fine and costs, imprisonment, while the conviction ordered that in default of payment forthwith, distress, and in default of sufficient distress, imprisonment.

Held, following *Regina* v. *Kennedy*, 12 O.R. 358, 360, 361, the conviction was bad on this ground.

Aylesworth for the applicant.
Delamere contra.

MACMAHON, J.] [July 20.

YOUNG *v.* CORPORATION OF RIDGETOWN.

Municipal corporations—Invalid by-law—Injunction restraining acting under—Passing new valid by-law.

The municipal corporation of R. were restrained by injunction from purchasing a site for a town hall under a by-law passed therefor, because the by-law did not provide for the levying a rate therefor, and there was no money on hand for the purpose. After the injunction was obtained the corporation passed a new by-law reciting that the validity of the existing by-law had been questioned, and directed its repeal, and that their solicitors should move the Court to have proceedings stayed thereunder and to settle the action therein. The new by-law provided for the levy of a rate during the year to raise the money required to purchase said site.

Held, that the corporation, by repealing the old by-law and directing the purchase of the same property under the new by-law valid on its face, was not disobeying the injunction which prohibited the purchasing of the property under the old by-law; and a motion for a writ of sequestration was therefore refused.

Meredith, Q.C., for the plaintiff.
Matthew Wilson contra.

Div'l Ct.] [Sept. 7.

REGINA *v.* VERRAL.

Baggage Transfer Co.—Employee going through train for baggage under agreement with railway company—City by-law against soliciting baggage—Evidence—Ultra vires.

A city by-law prohibited any person licensed thereunder soliciting any person to take or use his express waggon, or employing or allowing any runner or other person to assist or act in consort with him in soliciting any passenger or baggage at any of the "stands, railroad stations, steamboat landings, or elsewhere in the said city," but persons wishing to use or engage any such express waggon or other vehicle should be left to choose without any interference or solicitation. C., an employee of a baggage transfer company, boarded an arriving railway passenger train at one of the city stations, on its way to the Union station, and went through the cars calling out "Baggage transferred to all parts of the city," and having in his hands a number of the transfer company's checks. No baggage was taken at the time C. was continually doing this, and it appeared to be his sole duty. C. acted under instructions from the transfer company who had an agreement therefor with the railroad company.

Held, that there was no breach of the by-law but merely the carrying out of the transfer company's agreement with the railroad company; and further that the railroad train did not come within any of the places mentioned in the by-law.

Per ROSE, J.—If the by-law had covered this case it would have been *ultra vires*.

Aylesworth for the applicant.

Bigelow contra.

GALT, C.J.] [Sept. 7.

COBOURG *v.* VICTORIA.

Victoria University—Meetings of senate—Where to be held—4 and 5 Vict., c. 37—47 Vict., c. 93 (O.)

By 4 & 5 Vict., c. 37, Victoria College was incorporated as at Cobourg. Sec. 3 enacts that the Principal and Professors together with the Board shall constitute the College Senate, which may be assembled as occasion may require by the Principal by giving one month's notice in the official *Gazette* in this pr vince. In 1884 47 Vict., c. 93 (O.) was passed whereby Victoria College and another college was placed under the charge and control of the General Conference of the Methodist Church under the name of Victoria University. Sec. 10 enacts that the President of the University shall be the Chancellor thereof and shall call and preside at all meetings of the Senate. Certain statutes of the University were passed relative to the sessions of the Senate, which provided (1) That the Senate should meet on the first Monday after the college opening, and continue in session by adjournment for eight weeks; (2) A second session should be held commencing on the first Wednesday in March, and continue by adjournment until the close of the academic year; (3) Special sessions of the Senate might be called at any other date by the Registrar on the authority of the Chancellor. On 20th of May, 1889, the Chancellor issued a notice calling a meeting of the Senate at Toronto, and the Registrar of the University issued a similar notice. A meeting was held at Toronto under protest. After the passing of 38 Vict. special meetings of the senate had been held at Toronto, but it did not appear how these meetings had been called, or if any notice had been given in the official *Gazette*.

Held, that under the existing statutes the meetings of the Senate must be held at Cobourg, the site of the University, and therefore the meeting called for and held at Toronto on May 20th was illegal.

Robinson, Q.C., and *C. J. Holman* for the plaintiff.

Britton, Q.C., and *Moss*, Q.C., for the defendants.

Div'l Ct.] [Sept. 7.

REGINA *v.* GRANT.

By-law authorizing imprisonment for six months—Validity of—Conviction—Costs of conveying to gaol included in—Invalidity of—Evidence of defendant.

A by-law of the city of Brantford enacted that any person found drunk in any of the public streets, etc., thereof, should be subject to the penalty thereby imposed, namely, to a fine of not exceeding $50 inclusive of costs, and in default of payment forthwith of the fine and costs, distress, and in default of sufficient distress, imprisonment in the common gaol for a period not

exceeding six months unless the fine and costs were sooner paid.

Held, that under sub-sec. 19 of sec. 47, R.S.O., c. 184, there was power to authorize imprisonment for the period mentioned.

A conviction under the by-law directed in default of payment forthwith of the fine and costs and sufficient distress, imprisonment for ten days in the common gaol unless the costs and charges, including the costs of conveying to gaol, were sooner paid.

Held, that the conviction was bad, as there was no power to include the costs of conveying to gaol.

On a trial of an offence under the by-law the magistrate cannot refuse to receive the defendant's evidence.

Mackenzie, Q.C., for the motion.

Aylesworth contra.

ROBERTSON, J.]

MCMILLAN *v.* BARTEN.

Trust—Evidence of fraud—Statute of frauds—Costs.

Certain lands were purchased by the defendant G.B., who paid the cash required at time of purchase, taking the deed in the name of his daughter, the defendant F.B., who gave a mortgage for the balance of the purchase money. Parol evidence was admitted to show that the defendants were trustees for the plaintiff. The evidence also showed that the defendants were acting in collusion to defraud plaintiff. The plaintiff was held entitled to redeem on repaying the amount advanced, and on indemnifying F.B. against the mortgage.

When the purchase by plaintiff was at first contemplated, the intention was to repay the amount required for the cash payment out of moneys due for work done by plaintiff's husband on a contract entered into in his wife's name, the husband being insolvent, but this was not carried out and formed no part of the arrangement subsequently made with G.B., whose sole object was, as he said, to assist the plaintiff.

Held, therefore, that an objection taken that the plaintiff had no *locus standi* to maintain the action could not prevail, the purchase of the land being by G.B. as the plaintiff's agent, and in furtherance, as was shown, of an offer therefor in writing by plaintiff, which was verbally accepted.

Held, that the statute of frauds had no application.

Bain, Q.C., and *Greene* for plaintiff.

Moss, Q.C., for defendant, F. Barton.

Millar for defendant, G. Barton.

MACMAHON, J.]

PRITCHARD *v.* PRITCHARD.

Order on solicitor to repay money into court—Disobedience of—Contempt of court—Order for committal—Con. Rule 867.

The plaintiff solicitor in a case had obtained an order for the payment out to him of certain moneys in court together with the accrued interest thereon, and upon such order obtained the moneys. Subsequently an order was obtained rescinding the above order, and directing the solicitor to forthwith repay the said moneys into court and to pay the costs of the application; and that upon such repayment into court, he could have his bills of costs taxed, and out of such moneys the amount thereof should be paid out to him. The order was personally served on the solicitor, and on his non-compliance therewith, a motion was made for his committal.

Held, that the order for committal should go, for what was sought by the motion was the punishment of the solicitor for his contempt in disobeying the order of the court, and that Con. Rule 867 had no application.

F. C. Moffatt for the motion.

C. J. Holman contra.

BANK OF COMMERCE *v.* BRITISH AMERICA ASSURANCE CO.

Insurance—Fire—Statutory condition as to terminating risk—Notice of termination—Sufficiency of—Amount of unearned premium—Tender of.

By the 19th statutory condition of fire insurance policies, "The insurance may be terminated by the company by giving notice to that effect, and, if on the cash plan, by tendering therewith a rateable proportion of the premium for the unexpired term, calculated from the termination of the notice; in the case of personal service of the notice five days' notice, excluding Sunday, shall be given. Notice may be given

by any company, having an agency in Ontario, by registered letter addressed to the assured at his last post-office address notified to the company, and where no address notified, then to the post-office of the agency from which application was received, and where such notice is by letter, then seven days from the arrival at any post-office in Ontario shall be deemed good notice. And the policy shall cease after such tender and notice aforesaid, and the expiration of the five or seven days as the case may be."

The defendants' agent called on A., who was insured under a policy of fire insurance in the defendants' company, and handed him a letter written by himself, stating that the company "have instructed me to cancel their policy 2,862,361, held by the Bank of Commerce, and I therefore send you herewith $13.75 for unearned premium on same."

The agent said that on handing A. the letter he took the money out of it, counted it over, and laid it down beside the letter, and when A. refused to receive the money he (the agent) said he had no alternative but to tender it. He also said that he told A. that he had, under the conditions of the policy, a limited time to replace the insurance.

Held, GALT, C.J., dissenting, that the letter was not a sufficient cancellation of the insurance within the meaning of the condition; that the condition required written notice; and such notice must state that the insurance would be cancelled on the expiration of five days, whereas here the notice was of an immediate cancellation; and also that the rateable proportion of the premium for the unexpired term should have been calculated from the termination of the notice.

Caldwell v. *Stadacona Fire and Life Insur. Co.*, 11 S.C.R. 212, commented on.

Quære, per ROSE, J., whether the letter was anything more than a notice of the agent's instructions.

Lash, Q.C., for the plaintiffs.

Bain, Q.C., for the defendants.

PAXTON *v.* SMITH.

Statute of Limitations—Defendant maker of note and sole executor of surety—Payment by defendant on his own account.

The defendant, who was the maker of a promissory note and also the sole executor of the surety thereto, out of his own money and on his own account only, within six years before action was brought, paid interest on the note.

Held, that such payment had not the effect of taking the note out of the Statute of Limitations as regarded the surety's estate.

Scane, of Chatham, for the plaintiff.

Pegley, of Chatham, for the defendant.

Chancery Division.

ROSE, J.] [Sept. 21.

OLDFIELD *v.* DICKSON.

Time the essence of a contract—Offer to sell land—Acceptance—Net price—Reasonable time to pay money.

Time may be of the essence of a contract even without any express stipulation, if it appears that such was the intention.

Defendant wrote his agent on March 25th, "If O. (plaintiff) still wants that farm . . . . . he can have it for $350 net, provided it can be arranged at once. Kindly advise me . . . . . if he accepts, and when he will pay the money over." Ten days after (April 6th) the agent telegraphed defendant, "O. will take the farm, will pay the money in two weeks." On April 11th defendant telegraphed, "Your offer of 6th comes too late."

Held, that an arrangement between defendant and his agent as to the latter's commission would not affect the *net* price as between plaintiff and defendant.

Held, also, that the enquiry, "When he will pay over the money" showed an intention to give a reasonable time for such purpose, and that under the circumstances two weeks was not an unreasonable time. But

Held, also, that the acceptance of defendant's offer was not in time.

Crossfield v. *Gould*, 9 A.R., 318, referred to.

Pepler and *J. H. Bowes* for plaintiff.

Hewson for defendant.

Practice.

BOYD, C.] [Oct. 23.

GRAHAM *v.* DEVLIN.

Judgment debtor—Examination of—Unsatisfactory answers—Motion to commit—Re-examination—Evidence—Rules 928, 932.

Upon a motion to commit the defendant for

unsatisfactory answers upon his examination as a judgment debtor;

Held, that the examination should not be so conducted as to try to entrap the debtor, but it should be full, fair, and searching.

2. That the broad test to be applied in gauging the character of the answers, in order to determine whether they are satisfactory, is: Having regard to the circumstances of each particular case, are the answers sufficient to satisfy the mind of a reasonable person that full and true disclosure has been made?

3. That where the particulars wherein dissatisfaction is felt have been pointed out, an opportunity should be given to the debtor of reconciling what may be conceived to be contradictions, or supplying what may appear to be omissions.

4. That the ordinary rules for dealing with evidence in litigated matters where money or money's worth only is involved, are not to be applied without more to cases where the liberty of the person is at stake. And in the present case, where the examination was protracted and ranged over a period of more than two years, during which the defendant had had two lines of business going on, he was allowed an opportunity to protect himself by explanations upon various parts of his examination, relied upon as showing that a considerable sum of money had not been accounted for, being brought to his notice; and having been thus further examined, and it not having been shown that he had any means available to satisfy the judgment, and his answers as a whole being reasonably satisfactory, in view of the rules above laid down, a motion to commit was refused. History of the enactments contained in Rules 928 and 932.

Hoyles for the plaintiff.

C. J. Holman for the defendant.

BOYD, C.] [Oct. 23-24.

GARDNER *v.* BURGESS.

Receiver—Rents and profits of mortgaged premises—Actions by mortgagees—Leave to proceed—Petition—Receiver's costs of appearing on—Tender of costs—Rule 1193.

Where actions were brought by mortgagees without the leave of the Court for sale of mortgaged premises, after the appointment of a receiver to receive the rents and profits of such premises, an order was made, upon the petition of the mortgagees, allowing the proceedings in the actions to stand, and allowing the petitioners to proceed with the actions notwithstanding the appointment of the receiver.

The receiver was served with notice of the presentation of the petition, and appeared thereon by counsel. The petition, besides praying for the relief which was granted, asked in the alternative that the receiver might be discharged, or that he might be ordered to pay the petitioners the arrears of principal and interest due on their mortgages, and the costs of the actions and the petition.

Held, that if the petitioners wished to protect themselves from paying costs they should have proceeded under Rule 1193, and tendered the receiver $5 with the petition; and this not having been done, and the relief asked in the alternative prayers being such as justified the appearance of the receiver, the receiver was entitled to be paid his costs by the petitioners; and the petitioners were allowed to add the sum so paid and their own costs to the mortgage debt.

Gunther for petitioner.

Arnoldi for receiver.

GALT, C.J.] [Oct. 25.

LLOYD *v.* WARD.

Close of pleadings—Default note—Time—Delivery, service, and filing—Rules 7, 371, 393, 398, 480.

The last of the eight days within which the defendants should have delivered their statements of defence, as required by Rule 371, was Saturday, the 12th October.

Rule 7 prescribes that the offices of the Court shall be kept open from ten a.m. to three p.m., except on holidays, etc.

Rule 480 prescribes that service of pleadings shall be effected on Saturdays before the hour of two p.m., and that service effected after two shall be deemed to have been effected on the following Monday.

Rule 393 provides that where any party makes default in delivering a statement of defence, the officer with whom the pleadings are filed may enter a note that the pleadings are closed.

Rule 398 says that delivering a pleading includes filing.

On Saturday, the 12th October, at twenty-five

minutes past two in the afternoon, no statements of defence having been filed or served on the plaintiff's solicitor, the officer entered a note that the pleadings were closed.

Held, that the officer had no power to close the pleading until the end of the day, which would be three o'clock; and therefore the note was irregular and should be set aside.

Watson for the plaintiff.

Hoyles and *C. J. Holman* for the defendants.

Appointments to Office.

COUNTY JUDGES.

Grey.

S. J. Lane, of Owen Sound, County Court Judge, to be a Surrogate Judge of the Maritime Court of Ontario.

Carleton.

W. Mosgrove, of Ottawa, to be Junior Judge of the County Court of the County of Carleton and Local Judge of the High Court of Justice.

Elgin.

D. J. Hughes, of St. Thomas, County Court Judge, to be a Surrogate Judge of the Maritime Court of Ontario.

Prescott and Russell.

P. O'Brian, of L'Original, Judge of the County Court of the United Counties of Prescott and Russell, to be a Local Master of the Supreme Court of Judicature for Ontario, and of the High Court of Justice and Court of Appeal, respectively, *vice* L. A. Oliver, deceased.

POLICE MAGISTRATE.

Lennox and Addington.

J. Daly, of Napanee, to be Police Magistrate in and for the Town of Napanee.

DIVISION COURT CLERKS.

Middlesex.

E. Rowland, of Strathroy, to be Clerk of the Sixth Division Court of the County of Middlesex, *vice* J. English, deceased.

BAILIFF.

Thunder Bay.

J. T. Campbell, of Fort William, to be Bailiff of the Third Division Court of the District of Thunder Bay, *vice* E. Donovan resigned.

Law Society of Upper Canada.

TRINITY TERM, 1889.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School, Osgoode Hall, Toronto.

Those Students-at-Law and Articled Clerks, who under the Rules are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be the most necessary for the guidance of the student.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively. On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectues on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

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GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

CURRICULUM OF THE LAW SOCIETY OF UPPER CANADA.

1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with clause

three of this Curriculum, and presenting to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be), on conforming with clause three of this Curriculum, without any further examination by the Society.

3. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, on or before the fourth Monday before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher and pay $1 fee; and on or before the day of presentation file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

4. The Law Society Terms are as follows:—

Hiliary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, second Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

5. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday of June of the same year.

6. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

7. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

8. Service under Articles is effectual only after the Primary Examination has been passed.

9. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

10. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

11. Candidates for call to the Bar must give notice signed by a Bencher, on or before the fourth Monday before Term. Candidates for Certificates of Fitness are not required to give such notice.

12. Candidates for Call or Cert ficate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

13. No information can be given as to marks obtained at Examinations.

14. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

15. All notices may be extended once, if request is received prior to day of Examination.

16. Questions put to Candidates at previous Examinations are not issued.

FEES.

Notice Fee	$ 1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

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1. A Graduate in the Faculty of Arts, in any University in Her Majesty's Dominions empowered to grant such Degrees, shall be entitled to admission on the Books of the Society as a Student-at-law, upon conforming with clause

three of this Curriculum, and presenting to Convocation his Diploma or proper Certificate of his having received his Degree, without further examination by the Society.

2. A Student of any University in the Province of Ontario, who shall present a Certificate of having passed, within four years of his application, an examination in the subjects prescribed in this Curriculum for the Student-at-law Examination, shall be entitled to admission on the Books of the Society as a Student-at-law, or passed as an Articled Clerk (as the case may be), on conforming with clause three of this Curriculum, without any further examination by the Society.

3. Every Candidate for admission as a Student-at-law or Articled Clerk, shall file with the Secretary, on or before the fourth Monday before the Term in which he intends to come up, a Notice (on prescribed form), signed by a Bencher and pay $1 fee; and on or before the day of presentation file with the Secretary a petition and a presentation signed by a Barrister (forms prescribed), and pay prescribed fee.

4. The Law Society Terms are as follows:—

Hiliary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, second Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

5. Graduates of Universities who have given due notice for Easter Term, but have not obtained their Diplomas in time for presentation on the proper day before Term, may, upon the production of their Diplomas and the payment of their fees, be admitted on the last Tuesday of June of the same year.

6. Articles and assignments must not be sent to the Secretary of the Law Society, but must be filed with the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

7. Full term of five years, or, in the case of Graduates, of three years, under articles, must be served before Certificates of Fitness can be granted.

8. Service under Articles is effectual only after the Primary Examination has been passed.

9. When the time of an Articled Clerk expires between the third Saturday before Term and the last day of the Term, he should prove his service by affidavit and certificate up to the day on which he makes his affidavit only, and file supplemental affidavits and certificates with the Secretary on the expiration of his term of service.

10. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive Certificates of Fitness, Examinations passed before or during Term shall be construed as passed at the actual date of the Examination, or as of the first day of Term, whichever shall be most favorable to the Student or Clerk, and all Students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

11. Candidates for call to the Bar must give notice signed by a Bencher, on or before the fourth Monday before Term. Candidates for Certificates of Fitness are not required to give such notice.

12. Candidates for Call or Cert ficate of Fitness are required to file with the Secretary their papers, and pay their fees, on or before the third Saturday before Term. Any Candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

13. No information can be given as to marks obtained at Examinations.

14. A Teacher's Intermediate Certificate is not taken in lieu of Primary Examination.

15. All notices may be extended once, if request is received prior to day of Examination.

16. Questions put to Candidates at previous Examinations are not issued.

FEES.

Notice Fee	$ 1 00
Student's Admission Fee	50 00
Articled Clerk's Fee	40 00
Solicitor's Examination Fee	60 00
Barrister's Examination Fee	100 00
Intermediate Fee	1 00
Fee in Special Cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

BOOKS AND SUBJECTS FOR EXAMINATIONS.

PRIMARY EXAMINATION CURRICULUM for 1889.

Students-at-Law.

1889. Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.
Cicero, In Catilinam, I.
Virgil Æneid, B. V.
Cæsar, B. G. b, I. (1-33.)

1890. Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's composition, and re-translation of single passages.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical reading of a selected Poem:

1889—Scott, Lay of the Last Minstrel.

1890—Byron, The Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography–North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A Paper on Grammar.

Translation from English into French Prose.

1888, 1889 Souvestre, Un Philosophe sous le toits.

1889—Lamartine, Christophe Colomb.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, and Somerville's Physical Geography; *or*, Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

Articled Clerks.

In the year 1889, the same portions of Cicero, *or* Virgil, at the option of the candidate, as noted above for Students-at-law.

Arithmetic.

Euclid Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

RULE *re* SERVICE OF ARTICLED CLERKS.

From and after the 7th day of September, 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office, or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors, in the business, practice, or employment of a solicitor.

First Intermediate.

Williams on Real Property, Leith's edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and Cap. 123, Revised Statutes of Ontario, 1887, and amending Acts.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages, and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada, 2nd edition; the Ontario Judicature Act; R.S.O., 1887, cap. 44, the Consolidated Rules of Practice, 1888, the Revised Statutes of Ontario, 1887, chaps. 100, 110, 143.

For Certificate of Fitness.

Armour on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, Vol. I., containing the Introduction and Rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the Final Examination are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Canada Law Journal.

VOL. XXV. DECEMBER 2, 1889. No. 19

WE notice in the *Irish Times* of November 6th an event which must have been as gratifying to the gentleman principally concerned as it is interesting to his many friends in this country. The *Times* thus refers to the incident :—"Yesterday, at the sitting of the Court of Chancery, an unusual and interesting ceremony took place in the special honorary call to the Bar, by the Lord Chancellor, of a distinguished Irishman, who has been staying for an interval amongst us, from the Canadian Dominion. The Benchers will be commended by every member of the profession, and the public will cordially endorse their action for conferring such an honour upon the Hon. Senator Gowan. As we have said, Judge Gowan is a native of Ireland, and ranks high amongst the numerous body of able men who have risen to eminence in the Colonies." After referring to Mr. Gowan's services, the article proceeds :—"We have no doubt that Senator Gowan very highly appreciates the honour done to him in associating him in fellowship with the Bar of his native country, and he will return to his high duties in Canada with, we should hope, a pleasing recollection of the hospitality shown to him, and the gratified consciousness that his abilities and character are known and appreciated alike by the legal profession in Ireland, and by his countrymen generally." The learned Senator's connection with this JOURNAL in years past makes it a pleasant task to us to call attention to this compliment to one who has been so useful to his country in his day and generation.

PRIORITIES UNDER THE REGISTRY ACT.

The decision of the Court of Appeal in the case of *Maclennan* v. *Gray*, 16 App. R. 244, in which the Court was unanimous in overruling the judgment of the learned Chancellor, is one deserving the attention of the profession. The facts of the case were a little peculiar, and it was admitted that no precedent could be found on either side; the adjudication, therefore, confessedly proceeds by reference to the general principles of law bearing on the subject, a process, we may observe, by which so much of our law has been developed.

A testator died entitled to a parcel of land which, subject to an annuity to his widow, he devised to his sons Richard and John, the widow being also entitled to dower therein.

In March, 1879, Richard and John mortgaged the land to Coughlin, to secure $700. The widow knew of the making of this mortgage, but refused to join in it.

In November, 1879, Richard and John mortgaged to Maclennan for $4,000, and in this mortgage the widow joined as surety for her sons, receiving no benefit from the money raised.

Maclennan registered his mortgage prior to Coughlin's, and without notice of it, and thereby gained priority over it.

Subsequently, under proceedings had under the Maclennan mortgage, the lands were sold, and realized $7,500. After payment of Maclennan's claim, $1,612 remained in court, and the question for the Court was, whether Coughlin or the widow were entitled to it. The Chancellor decided in favour of the widow, but the Court of Appeal have awarded Coughlin priority. First of all they say that the priority gained by Maclennan under the Registry Act did not enure to the benefit of the widow, as she was not a purchaser or mortgagee for value; nor was she entitled to that priority by virtue of her being surety for the mortgagor, because the doctrine of subrogation could not be invoked, to defeat the honest claims, and superior equities of third persons.

When we come to consider the legal effect of Coughlin's mortgage, it is clear that it was effective merely to convey the estate of the two mortgagors, John and Richard. It did not affect the widow's dower. All the estate, therefore, he acquired in the land was an estate subject to dower.

Maclennan, on the other hand, acquired an interest as mortgagee which included the estates of John and Richard and also that of the widow. By prior registration he acquired priority over Coughlin's mortgage as regards the estates of John and Richard, but as regards the estate of the widow, he was entitled to priority as regards that, entirely apart from any question of registration.

The land being sold produces $7,500, and the master finds that the value of the widow's dower in the property is equal to $1,162, which is the amount which remains over and above what is sufficient to satisfy Maclennan's claim.

Now it must be borne in mind that what has been sold is not merely John and Richard's interest which was the subject of the mortgage to Coughlin, but the widow's dower also, to which Coughlin had no claim, and at first sight it might appear that, the mortgage having been satisfied out of the principal's estate, what remained must necessarily be attributable to the amount realized from the widow's dower, more especially as the amount of the value of the dower and the amount of the surplus coincided. But more careful consideration will, we think, lead to the conclusion (as the Court of Appeal have, in fact, determined) that Coughlin had a superior equity to the money, to the extent of his claim. Because, when the widow joined in the mortgage to Maclennan she knew that the principals had previously mortgaged their estate, and had the transaction been carried out as she contemplated, or may reasonably be supposed to have contemplated, when she joined in the Maclennan mortgage, it is quite clear that the estate of her principals would have had to make good the Coughlin mortgage, before it could have been applicable to pay the Maclennan mortgage. The decision of the Court of Appeal virtually places

the widow in the position in which she contracted to stand, and of which she cannot reasonably complain.

The question of priority involved in this case was a nice one, and, as we have already said, ungoverned by any decided case, and we think the Court of Appeal has, by a sound application of principles, successfully solved the difficulty.

BREACH OF PROMISE OF MARRIAGE.

Is the use by the woman of coarse, obscene, and profane language and her indulgence in profane swearing, a justification of the refusal to marry? This question would be answered by most persons in the affirmative. The contract is for companionship for the life of the contracting parties, and one might reasonably suppose that conduct which would render the woman undesirable as a companion and unfit for the duties of wife and mother, would *ex necessitate* justify a refusal to marry. If promises to marry are to give a right of action one would think that the contract should be treated, so far as conduct is concerned, as one requiring the utmost good faith; and that non-disclosure and subsequent discovery of infirmities of temper and disposition, and impurity and coarseness of language would be a good defence to an action for breach of the engagement. The Court of Appeal, as will appear, has put a limited construction on chastity, or the lack of chastity, as a defence, and restricts it to want of bodily purity. Profane cursing and swearing is evidence of a depraved taste as well as of a disregard for moral propriety, and even if chastity be restricted to mean bodily impurity, evidence of the habitual use of profanity and obscene language surely ought to be admitted as a bar to the action as well as in mitigation of damages. It is a matter of common knowledge that looseness of language usually accompanies looseness of morals.

In *Grant* v. *Cornock*, *infra* page 603, the Court of Appeal, following the English decisions on the point, and affirming the judgment of the Queen's Bench Division, 16 O.R. 406, answered the above question in the negative. In this case it was alleged as a defence to the action that the defendant was justified in terminating the engagement and in refusing to marry the plaintiff by reason of the conduct of the plaintiff, who on several occasions fell into violent fits of rage with the defendant and used coarse, obscene, and profane language to others and in public places, and sang obscene songs, and that the plaintiff became and was addicted to the habit of profane swearing, and indulged in such language on the public streets. The judge at the trial refused to admit evidence on this ground of defence, and his ruling was upheld by the Queen's Bench Divisional Court. Armour, C.J., in his judgment said, "I am of opinion that these paragraphs do not set up any justification in law for the breach by the defendant of his promise to marry the plaintiff, and that therefore evidence tendered in support of them was rightly rejected. The discussion and decisions in *Hall* v. *Wright*, E.B. & E. 746, *Beachey* v. *Brown*, E.B.& E., 796, and *Baker* v *Cartwright*, 10 C.B.N.S. 124, show that the misconduct in the woman which will alone justify the breach of

his promise by the man must amount to want of chastity, and such want of chastity is not set up in these paragraphs."

Street, J., concurred with the Chief Justice on this point. "The next ground is that the defendant was justified in refusing to carry out his contract to marry the plaintiff. This ground shortly raises the question of law as to what misconduct on the part of the woman will justify the man in breaking off a contract to marry her. I have looked carefully into the authorities cited to us, and many others, both English and American, and it appears to me to be the plain result of them that the only conduct on the part of the woman occurring after the engagement which will justify the man in refusing to carry it out is a breach of the implied condition that she will preserve her bodily chastity. The evidence set up under which the defendant justifies his refusal to marry the plaintiff, falls short of alleging any breach of this condition, and the evidence certainly did not go beyond the statement of defence. No proof was given or attempted to be given of any improper intimacy with any one, and I am of opinion, therefore, that the justification attempted to be set up was insufficient, even had it been fully proved, to entitle the defendant to refuse to carry out his promise. See *Beachy* v. *Brown*, *supra*, *Hall* v. *Wright*, *supra*, *Baker* v. *Cartwright*, *supra*, *Berry* v. *Bakeman*, 44 Maine 164, *Kniffen* v. *McConnell*, 30 N.Y. 285."

Falconbridge, J., dissented from the other members of the court on this point, and remarks at page 417: "I desire to guard myself against being understood to concur in the opinion that the 4th and 5th paragraphs of the statements of defence are bad in law. I do not find it unequivocally laid down in the English cases that want of sexual purity is the only cause which will justify a breach of promise of marriage. I do not regard the discussions in *Hall* v. *Wright* and *Beachey* v. *Brown* as amounting to that, although I am free to admit that Erle, C. J., in *Baker* v. *Cartwright*, 106 B.N.S., at page 125 seems to assume that they do. I prefer to think that the 'chastity' referred to is not merely freedom from unlawful sexual commerce, but freedom from obscenity or impurity in language or conversation."

The English authorities cited in support of the decision of the court certainly do not amount to more than a mere discussion (to use the language of Falconbridge, J.) of what is implied in the contract to marry. The point in *Hall* v. *Wright* may be briefly stated to be "Is the continuance of health, that is, of such a state of health as makes it impossible to marry, an implied condition of the contract to marry?" The Court of Exchequer Chamber decided by four to three that it is not, the Court of Queen's Bench having been equally divided. The decision itself is so much against the tendency of the later cases that it is now of little importance beyond the point actually decided, which for the obvious reasons indicated in some of the judgments is not at all likely to recur (*vide* Pollock on Contract, Bl. Ed. 376). In *Beachey* v. *Brown* it was held that the non-disclosure of a prior subsisting engagement to marry another was no defence to an action for breach of promise to marry; and in *Baker* v. *Cartwright* that it is no answer that the plaintiff had, before the making of the promise, been of unsound mind, and had been confined in a lunatic asylum, provided she was sane at the time of

the promise. In the last case Erle, C.J., held, following *Beachey* v. *Brown*, that the want of chastity is the only exception implied in the contract to marry. But after an attentive perusal of *Beachey* v. *Brown* it cannot safely be stated that any absolute rule was laid down therein on the point in question. The point, however, is settled, for the present, for this province, by the decision in *Grant* v. *Cornock*, in which it is held by the Appellate Court that want of bodily chastity is the only justification for the breach of promise to marry, and that the use by the woman of coarse, obscene, and profane language, and her indulgence in profane swearing, would not justify the refusal to marry. It would be more in accord with justice and common sense if the decision had been to the contrary.

PRESUMPTION OF DEATH.

A good example of how judges, in administering the law and fitting it to the ever-changing combination of facts that come before them, must legislate incidentally and in a subsidiary way is shown in the origin of the rule as to presumption of death of a person who has been absent for seven years and not heard of by those who would naturally have heard if he had been alive. In our own courts the leading case on the subject is *Doe d. Hagerman* v. *Strong et al.*, 4 U.C.R. 510, affirmed in 8 U.C.R. 291. In that case it was proved at the trial in 1847 that A. was last seen in the province in December, 1827, and was never afterwards heard of. A *fi. fa.* against A.'s land was placed in the sheriff's hands on the 13th of July, 1833, tested the 29th of June, 1833. The heir of A. brought ejectment against the purchaser at the sheriff's sale, under an execution against A., and attempted to recover upon the ground that, after 22 years had elapsed since A. was last heard of, the presumption that he did not die till the expiration of the seventh year was at an end; that defendant must show that he did not die till after the seventh year; and that the jury should be directed to find whether he did or did not die within the seven years. It was, however, held that the proper direction was that at the end of seven years the fact of death was to be presumed, and not sooner, unless there was some evidence affecting the probability of life continuing so long, and also that the plaintiff, not the defendant, must show when A. died. On the same point the following cases may be referred to: *Doe d. Arnold* v. *Auldjo*, 5 U.C.R. 171, and *Giles* v. *Morrow*, 1 O.R. 527. We cite the following remarks on the origin of the rule from an able article in the November number of the *Harvard Law Review*, on Presumptions and the Law of Evidence:—The rule of presumption is that a person shall, in the absence of evidence to the contrary, be taken to be dead, when he has been absent for seven years and not heard from by those who would naturally have heard, if he had been alive. This is a modern rule. It is not at all modern to infer death from a long absence; the recent thing is the fixing of a time of seven years, and putting this into a rule. The faint beginning of it as a common-law rule, and one of general application in all questions of life and death, is found, so far as our recorded cases show, in *Doe d. George* v. *Jesson* *

* 6 East, 80.

(January, 1805). Long before this time, in 1604, the "Bigamy Act" of James I.* had exempted from the scope of its provisions, and so from the situation and punishment of a felon, (1) those persons who had married a second time when the first spouse had been beyond the seas for seven years, and (2) those whose spouse had been absent for seven years, although not beyond the seas—"the one of them not knowing the other to be living within that time." This statute did not treat matters altogether as if the absent party were dead; it did not validate the second marriage in either case. It simply exempted a party from the statutory penalty. Again, in 1667, the statute of 19 Car. II., c. 6, "for Redresse of Inconveniences by want of Proofe of the Deceases of Persons beyond the Seas or absenting themselves, upon whose Life Estates doe depend," had provided, in the case of estates and leases depending upon the life of a person who should go beyond the seas, or otherwise absent himself within the kingdom for seven years that where the lessor or reversioner should bring an action to recover the estate, the person thus absenting himself should "be accounted as naturally dead," if there should be no "sufficient and evident proof of the life," and that the judge should "direct the jury to give their verdict as if the person . . . . were dead." But if the absent party should not really have died, provision was made for a subsequent recovery by him. The effect of this statute, then, was to end, in a specific class of cases, all inquiring into evidence, by a certain assumption; or, as it is called, by a presumption. The rule fixes, for the purpose of a particular inquiry, the effect of specified facts; absence for seven years, unheard of, is, as regards this particular inquiry, to be accounted as being the same thing as death; it is its legal equivalent. Now, subsequently, similar cases may have been brought within "the equity" of the statute, as Chief Justice Holt, in 1692,† is reported to have "held that a remainder-man was within the equity of that law;" but we hear of no suggestion of a general seven-year rule such as we have now, before 1805.‡ In the case of *Doe d. George* v. *Jesson*,‖ the Court of King's Bench —on a rule for a new trial, in an action of ejectment, which turned on the question whether the plaintiff's lessor had entered within the time allowed by the Statute of Limitations, which again turned on the time of the death of the lessor's brother, who had gone to sea and had not been heard of for many years —sustained a ruling that the jury must find the time of death as well as they could . . . that at any time beyond the first seven years they might fairly presume him dead; but the not hearing of him within that period was hardly sufficient to afford that presumption. Lord Ellenborough said: "As to the period when the brother might be supposed to have died, according to the statute, 10 Car. II., c. 6, with respect to leases dependent upon lives, and also according to the statute of bigamy (1 Jac. I., c. 2), the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be

*St. 1 Jac. I., C. 11.

†*Holman* v. *Eston*, Carth, 246.

‡See, for instance, *Rowe* v. *Hasland*, 1 Wm. Bl. 404 (1762); *Dixon* v. *D.*, 3 Bro.C.C., 510 (1792); *Lee* v. *Willcock*, 6 Ves., 605 (1802).

‖6 East, 80.

living. Therefore, in the absence of all other evidence to show that he was living at a later period, there was fair ground for the jury to presume that he was dead at the end of seven years from the time when he went to sea on his second voyage, which seems to be the last account of him." This was supporting what the jury had done. All that this case lays down is that the jury were justified, on the analogy of the two statutes, in finding death by the end of the seven years; and, moreover, looking at Mr. Justice Rooke's ruling, which was not questioned upon this point, that they would not be justified in finding it earlier. It was not laid down that they ought to find death at the end of seven years, or that they must; nor was any rule of presumption put forward; nor, as I say, was this the point on which the ruling below was questioned in the full bench. In 1809, at *nisi prius*,* in an action against a woman on a promissory note, she pleaded coverture, and proved her marriage; but the husband had gone to Jamaica twelve years ago, and the question was as to the way of proving that he was now living. The defendant insisted that he must be presumed to be alive; but Lord Ellenborough ruled that "evidence" must be given of his being alive within seven years. This was given, and the defendant had a verdict. In the other case the aim was to prove death; here, life; and here the ruling was that a court cannot assume life now, when all that it knows is that the party had been absent and unheard from for more than seven years. Upon the basis of these cases, there soon appeared in the text-books on evidence, for the first time, in 1815, a general proposition that "where the issue is upon the life or death . . where no account can be given of the person, this presumption (viz., that a living person 'continues alive until the contrary be proved') ceases at the end of seven years from the time when he was last known to be living—a period which has been fixed from analogy to the statute of bigamy and the statute concerning leases determinable upon lives."† In this form the matter was again put by Starkie, ten years later, in the first edition of his book; and by Greenleaf, and so by Taylor. But the judges as well as text-writers got to expressing what had been put as a cessation of a presumption of life in the form of an affirmative presumption of death; and this was put as a rule of general application whereever life and death were in question. And so Stephen puts it:‡ "A person shown not to have been heard of for seven years by those (if any) who if he had been alive would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death." This rule is set down by Stephen among the few presumptions which he thinks should find a place in the law of evidence; his definition of the term "presumption" being, as it will be remembered,‖ "a rule of law that courts and judges shall draw a particular inference from a particular fact or from particular evidence unless and until the truth of such inference is disproved." Stephen published his Digest in 1876. Here then, in seventy years, we find the rule about a seven years' absence (1) coming into existence in the form of a judicial declaration about what may or may not fairly be inferred by a jury in

* *Hopewell* v. *De.*, Pinna 2, Camp. 113.
† Phil. Ev. i., 152 (2nd ed.)
‡ Dig. Ev. art. 99.
§ Dig. Ev. art. 1.

the exercise of their logical faculty, the particular period being fixed by reference to two legislative determinations in specific cases of a like question; (2) passing into the form of an affirmative "rule of law" requiring that death be assumed under the given circumstances. This is a process of judicial legislation, advancing from a mere recognition of a step in legal reasoning to a declaration of the legal effect of certain facts.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We continue the Law Reports for October comprised in 23 Q.B.D., pp. 373-413; 14 P.D., pp. 131-150; and 42 Chy.D., pp. 93-208.

TRADE NAME—INJUNCTION—DEFENDANT USING HIS OWN NAME—COSTS.

Turton v. *Turton*, 42 Chy.D. 128. It is not very surprising to find that an attempt made by the plaintiffs to restrain the defendants from using their own name for the purpose of their trade was not successful. The plaintiffs had carried on for many years business as steel manufacturers under the name of "Thomas Turton & Sons." The defendant, John Turton, had carried on a similar business for many years in the same town, at first as "John Turton," and then as "John Turton & Co.," and latterly, in 1888, he took his sons into partnership and carried on the same business as "John Turton & Sons." There was no evidence of any attempt on the defendants' part to imitate the plaintiffs' trade marks or labels. North, J., thought the plaintiffs entitled to succeed, but the Court of Appeal (Lord Esher, M.R., and Cotton and Fry, L.JJ.), though conceding that there was a probability that the public would be occasionally misled by the similarity of the names of the two firms, yet held that the defendants were lawfully using their own names, and could not be restrained by injunction from so doing. The plaintiffs were ordered to pay costs according to the higher scale.

VENDOR AND PURCHASER—RESTRICTIVE COVENANT—COVENANT RUNNING WITH THE LAND—OMISSION OF WORDS OF LIMITATION—MISDESCRIPTION—COMPENSATION—RESCISSION OF CONTRACT.

Re Fawcett & Holmes, 42 Chy.D., 150, was an appeal from an order of North, J., overruling objections to title. Fawcett, the vendor, had bought the property in question, which formed one lot of an estate laid out for building, and covenanted with the vendors that "he, his heirs, executors, administrators, and assigns," would make certain payments and do certain acts in respect of the property purchased, and the covenant proceeded, "and the said Fawcett on erecting any building on the said land shall only erect" buildings of a certain description. On the sale of the property by Fawcett to Holmes, the existence of the covenant was not disclosed; but it was held by North, J., and the Court of Appeal (Lord Esher, M.R., and Cotton and Fry, L.JJ.) that its non-disclosure formed no objection to the title, because the covenant in terms only related to buildings erected by Fawcett himself, and did not extend to his assigns, and was therefore merely a personal covenant, which did not run with the land. The property

was put up for sale as "a messuage, situate in T. Street, with the builder's yard, stables, and premises, as lately in the occupation of Fawcett, and containing 1,372 square yards." There was a condition that errors of description should not annul the sale, but if pointed out before the completion, compensation should be allowed. The property had originally contained 1,372 yards, but Fawcett, the owner, had sold off in 1870, 339 square yards, so that the property contained only 1,033 square yards, which was separated by a wall from the 339 yards, and were fenced round and well defined. On this point too the Court of Appeal agreed with North, J., that the purchaser had got substantially what he contracted for, and though the deficiency in quantity was considerable, yet that it did not take the case out of the condition, and that the purchaser was bound to complete with compensation. The following rule laid down by Tindal, C.J., in *Flight* v. *Booth*, 1 Bing. N.C. 370, 377, was approved: "That when the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such cases the contract is avoided altogether and the purchaser is not bound to resort to the clause of compensation."

COMPANY—IRREGULAR MEETING OF DIRECTORS—INVALID ALLOTMENT OF STOCK.

In re Portuguese Consolidated Copper Mines, 42 Chy.D. 160, was an application by one Steele, an allottee of shares of a company, to cancel the allotment and remove his name from the list of shareholders. The company had a Board of four directors. A meeting of the Board was called without due notice to all four directors, and only two in fact attended, who voted themselves a quorum, and proceeded to allot 100 shares to Steele, who had applied for them, and gave him notice of the allotment the same day, and they then adjourned the meeting to the next day. The next day the meeting was further adjourned to the following day; in the meantime Steele gave notice that he withdrew his application. The next day three directors were present at the adjourned meeting, and the fourth in writing approved of the previous resolution as to a quorum, and the meeting confirmed the allotments made at the prior meeting. But it was held by the Court of Appeal (Lord Esher, M.R., and Cotton and Fry, L.JJ.) that the first meeting of the directors was irregular for want of due notice to all the directors, and that the allotment of stock made at it was invalid, and could not be confirmed at the subsequent meeting, after the allottee had withdrawn his application.

SOLICITOR—LIEN—PROPERTY RECOVERED—COMPROMISE OF ACTION—PAYMENT TO CLIENT AFTER NOTICE OF LIEN.

Ross v. *Buxton*, 42 Chy.D. 190, is an instructive case on the subject of the nature and extent of a solicitor's lien on the proceeds of an action. In this case the defendant paid into court £50 in satisfaction of the plaintiff's claim for damages. Before trial an agreement was entered into between the defendant and his solicitors on the one side, and the plaintiff without his solicitor on the other;

the action was compromised upon the terms that the plaintiff should accept the £50 paid into court in full of all claims, and that defendant should do everything necessary to enable the plaintiff to get the money out of court. The plaintiff's solicitor then gave the defendant's solicitors notice not to pay any money to the plaintiff until his costs were satisfied. After the receipt of this notice the defendant's solicitors obtained payment to themselves of the £50 and paid it to the plaintiff. Under these circumstances Stirling, J., held that the £50 must be treated as the fruit of the action, and was liable to the plaintiff's solicitor's lien, and that the defendant's solicitors, having paid the money over to the plaintiff after notice of the lien, were personally liable to satisfy the lien, but that the defendant having neither received notice, nor authorized the payment, was not liable.

DEFAULTING TRUSTEE OF WILL—INTEREST UNDER WILL ACQUIRED BY TRUSTEE—ASSIGNEE FROM TRUSTEE—MAKING GOOD DEFAULT.

In *Doering* v. *Doering*, 42 Chy.D. 203, Stirling, J., decided, in accordance with *Jacobs* v. *Rylance*, 17 Eq. 341, that the rule that a defaulting trustee cannot claim as against his *cestui que trust* any beneficial interest in the trust estate until he has made good his default, and that his assignee is in no better position, even though the default may be committed after the assignment, applies not only to shares taken by the trustee under the instrument creating the trust, but also to shares which he acquires from any other *cestui que trust*. In this case Mrs. Doering, an executor and trustee, entitled under a will to a life interest in a trust fund, purchased from two beneficiaries their reversionary interests in the fund, which she assigned by way of mortgage. She was subsequently found a defaulter and died insolvent, and it was held that her mortgagee took subject to the equities existing against his mortgagor, and that the beneficiaries under the will were entitled to have her default made good out of the reversionary interests acquired by her, in priority to the claims of her mortgagee. The principle being, as Sir Geo. Jessel, M.R., expressed it, that the defaulting trustee is presumed to have paid himself all that he can claim out of the trust estate, out of the moneys which he has received, and for which he has not accounted.

The Law Reports for November comprise 23 Q.B.D., pp. 413-491; 14 P.D., pp. 151-174; 42 Chy.D., pp. 209-320.

INSURANCE AGAINST ACCIDENT—EXCEPTION OF ACCIDENT CAUSED BY EXPOSURE OF THE INSURED TO OBVIOUS RISK.

The first case which we deem it necessary to call attention to is *Cornish* v. *The Accident Insurance Co.*, 23 Q.B.D., 453. This was an action on an accident policy, which, by its terms, excepted from the risks insured against, accidents happening "by exposure of the insured to obvious risk of injury." The insured had come to his death by attempting to cross a railway track in broad daylight in front of an approaching train, there being no obstruction to prevent a person about to cross from seeing an approaching train. Lord Coleridge, C.J., before whom the action was tried, instructed the jury that the case fell within the

exception, and they returned a verdict in accordance with his ruling. which was sustained by the Court of Appeal (Lord Esher, M.R., and Lindley and Bowen, L.JJ.)

MORTGAGE OF LAND AND CHATTELS —NON-REGISTRATION OF MORTGAGE AS TO CHATTELS.

It may be useful to refer to *Climpson* v. *Coles*, 23 Q.B.D., 465, as it deals with an important question under the Bills of Sales Acts. The plaintiff sued for a wrongful seizure of his goods; the defendants justified the seizure under a mortgage made by the plaintiff, whereby the plaintiff mortgaged certain lands to the defendants, and by the same mortgage agreed that all building material brought upon the mortgaged premises should be deemed immediately attached to the freehold, and no part should be removed from the premises, but with the concurrence of the mortgagees. The mortgage contained a power, in case of default, for the mortgagees to enter and take possession, and to sell the lands, and all or any part of the building material. The Divisional Court (Denman and Stephen, JJ.) held that the existence of the power to sell the chattels apart from the land, rendered the mortgage a mortgage of chattels, notwithstanding the stipulation that the chattels should be deemed to be attached to the freehold, and therefore the mortgage as to them was void for non-registration. In this Province the objection of non-registration can only be taken by subsequent purchasers, and mortgagees, and creditors of the mortgagor; see R.S.O., c. 125, s. 4, and it is, of course, only as between such persons and a mortgagee that this case would be an authority.

SOLICITOR—STRIKING OFF ROLL FOR ALLOWING AN UNQUALIFIED PERSON TO PRACTICE IN HIS NAME—6 & 7 VICT., C. 73, S. 32—(22 GEO. II., C. 46; R.S.O., C. 147, S. 24)—RESTORING SOLICITOR TO ROLL.

In re Lamb, 22 Q.B.D., 477, was an application to restore a solicitor to the roll, who had been struck off for permitting an unqualified person to practice in his name. The Court of Appeal (Cotton, Fry, and Lopes, L.JJ.) affirmed the order of the Divisional Court, refusing the application, on the ground that although under the Attorneys and Solicitors' Act (6 & 7 Vict., c. 73, s. 26) the Court had a discretionary power, upon an application to strike a solicitor off the rolls for an offence under s. 32 of the Act, to inflict a punishment short of striking him off the rolls; yet if the Court does make an order striking him off, it has no power afterwards to reinstate him, as that statute provides that if he is struck off he is to be forever disabled from practising as a solicitor. R.S.O., c. 147, s. 24 is not as stringent in its terms, and merely provides that the solicitor may, in the discretion of the Court, be struck off the roll and disabled from practising as such solicitor. The 22 Geo. II., c. 46, however, was held to be in force in Ontario in *Dunne* v. *O'Reilly*, 11 C.P., 248, and section 11 of that Act provides that any attorney or solicitor allowing (as in the present case) an unqualified person to practice in his name, shall be struck off the roll and forever after disabled from practising as an attorney or solicitor; and should a similar question ever arise here, it may be found that the decision arrived at *In re Lamb* applies

with equal force, if not greater (owing to the unrepealed statute we have referred to) in Ontario.

COSTS—CERTIORARI—MEMBERS OF MUNICIPAL CORPORATION, PERSONAL LIABILITY OF, FOR COSTS.

In the *Queen* v. *Vaile*, 23 Q.B.D., 483, a rule having been made absolute to quash certain orders made by a town council for illegal payments out of the corporation funds, the present application was thereupon made to compel the individual members of the corporation who had voted for the illegal orders, personally to pay the costs of the proceedings to quash them. The Court (Lord Coleridge, C.J., and Field, J.), granted the application. This is an important decision, and one which should make members of municipal corporations very careful before sanctioning by their votes proceedings of doubtful validity.

ADMINISTRATION—LEGITIMACY OF PERSON CLAIMING TO BE NEXT OF KIN DISPUTED—"SPECIAL CIRCUMSTANCES"—20 & 21 VICT., C. 77, S. 73—(R.S.O., C. 50, S.56.)

In re Minshull, 14 P.D., 151, an application for administration was granted under the following circumstances: The legitimacy of the person claiming to be next of kin was disputed, but all persons interested in the estate of the intestate agreed that such claimant should apply for a grant of administration, and that the estate should afterwards be divided between them and the claimant. This, the Court was of opinion, constituted "special circumstances," warranting the grant of administration to the applicant under 20 & 21 Vict., c. 77, s. 73 (see R.S.O., c. 50, s. 56).

ADMINISTRATION—GRANT PENDENTE LITE—20 & 21 VICT., C. 77, S. 70—(R.S.O., C. 50, S. 53).

In re Fawcett, 14 P.D., 152, an executrix had died leaving a will, the validity of which was disputed; pending the litigation as to the validity of her will, a grant of administration, *de bonis non*, with the will annexed, was made to the estate of her testator under 20 & 21 Vict., c. 77, s. 70 (see R.S.O., c. 50, s. 53.)

COMPANY—DIRECTORS, POWERS OF—SHARES—TRANSFER—DISCRETION TO REFUSE TO REGISTER TRANSFER OF SHARES—CALLS—DATE OF CALLS—ORDER OF BUSINESS AT BOARD MEETINGS.

Several points of interest are discussed and determined *In re Cawley*, 42 Chy. D., 209. First of all, the extent of the discretion which directors have to refuse to register a transfer of shares is considered. The articles of association of a company gave the directors power to refuse to register transfers of shares by a shareholder if he was indebted to the company; and the Court of Appeal held, that the time for ascertaining whether the transferor is indebted, is the time when the transfer is sent in for registration, and not when it subsequently comes before a board meeting to determine whether the registration shall be made. Thus, one Hallett being a shareholder, and also a director, executed a transfer of his shares for value, and thereupon the transferee sent the transfer to the secretary of the company for registration, as required by the articles of association, and shortly afterwards, on its being submitted to a board meeting, the board declined to register it, and at the same meeting passed a resolution for a

call. The call thus made after the transfer, the Court of Appeal (Lord Esher, M.R., Cotton and Fry, L.JJ.)—reversing Chitty, J.—held not to be an indebtedness in respect of calls by the transferor, for which the directors could rightly refuse to register the transfer, even though the transferor was a director and aware that a call was imminent. Another point discussed is the time from which a call is validly made. In order that there may be a valid call, the Court of Appeal—reversing Chitty, J.—held that the resolution authorizing it to be made, must state, not only the amount of the call, but also the time at which it is to be paid. And where, as in this case, a resolution was passed for a call, which fixed the sum per share to be called up, but left the date at which it was to be paid in blank, which date was subsequently filled in by the secretary on his own responsibility; and at a meeting held three days afterwards the minutes of the former meeting, with the addition of the dates thus introduced by the secretary, were confirmed; and at a subsequent meeting on the 17th of January following, a resolution was passed settling and adopting the form of circular or notice of call; it was held that there had been no valid call made until the date and place of payment was fixed by the resolution of the 17th January, and that that resolution did not relate back to the 18th December. A third question arose as to the right of directors to alter the order of business on their *agenda* paper. This question arose in this way: the *agenda* paper at the directors' meeting contained as the first order of business the consideration of the transfer of shares sent to the secretary for registration; and then as the next business, the consideration of the question of making a call. The directors passed over the first order of business, and took up the question of making a call, and Chitty, J., held that they had a perfect right to do so, and to pass a resolution for a call as their first business, so as to prevent intending transferors from evading their liability by prior registration; but as the Court of Appeal came to a different opinion from Chitty, J., on the main questions, it was not necessary for them to consider this point of the case.

MORTGAGEE IN POSSESSION—ACCOUNT BY MORTGAGEE—PROVISO LIMITING SUM TO BE RECOVERED ON MORTGAGE.

In *White* v. *City of London Brewery Co.*, 42 Chy.D., 237, the decision of North, J., 39 Chy.D., 559, noted *ante* p. 83, was affirmed by the Court of Appeal. The defendants were mortgagees, and went into possession of the mortgaged property, which consisted of a public house, which they let to a tenant with a restriction that the tenant should take his supply of beer entirely from them; and it was held by Lord Esher, M.R., and Cotton and Fry, L.JJ., that the defendants must account for such additional rent as they would have received if the premises had been let without restriction, but that they were not liable to account for the profit they had made by the sale of beer to the tenant. Another point in the case was as to the effect of a proviso in the mortgage, whereby it was provided that "the total amount to be recovered by the mortgagee under these presents shall not exceed £900." The property was sold for £2,650, and at the time of the completion of the sale there was due to the mortgagees for principal

£1,415, and for interest £615, and they were chargeable with £396 for rents and profits. The £1,415 included £700 lent, and £88 for goods supplied pursuant to the terms of the mortgage, and for which it was intended as security; the rest of the £1,415 was made up of payments of rent, and fire insurance, and it was held by the Court of Appeal that the proviso did not apply either to interest, or to outgoings incident to the possession of the premises by the mortgagees, and that as the sum due for monies lent and goods supplied did not exceed the limit, the mortgagees were entitled to retain out of the proceeds of the sale the whole of the balance due to them.

EXPROPRIATION OF LAND BY RAILWAY CO.—LIABILITY OF RAILWAY CO. FOR COSTS OF GETTING MONEY OUT OF COURT—COSTS.

In re Brooshooft, 42 Chy.D., 250, a Railway Company expropriated a parcel of land comprised in a settlement, for the purposes of their railway, and paid the purchase money into court; and after payment, a testamentary appointment was made by a tenant for life, under the power contained in the settlement; and on her death a petition was presented by her appointees, for payment of the money out of Court. In consequence of the terms of the appointment, it became necessary to serve the petition on the trustees of the marriage settlements of two of the appointees, and additional costs were thus occasioned; and the question was whether the Railway Company was liable to pay them. Kay, J., held that the company must pay the costs (not being costs of adverse litigation) of all parties.

EQUITABLE MORTGAGEE—CONFLICTING EQUITIES—PRIORITY—NEGLIGENCE—CUSTODY OF TITLE DEEDS—TRUSTEE APPEARING TO BE ABSOLUTELY ENTITLED.

Carritt v. *Real and Personal Advance Co.*, 42 Chy.D., 263, is one of those cases in which the question arises, which of two innocent parties should suffer for the fraud of a third. Owing to our system of registration of deeds it is a case which would not be likely to arise in Ontario, at the same time it is instructive as an illustration of the extreme limit to which the maxim *qui prior est in tempore potior est in jure*, may sometimes be carried. The plaintiff purchased an equity of redemption in leaseholds, and for his own convenience took the conveyance in the name of one Chuck, his confidential clerk, no notice of the trust being disclosed in the assignment. Chuck fraudulently possessed himself of the assignment, and deposited it with the defendants, and executed a charge by demise of the equity of redemption in favour of the defendants, from whom he borrowed money and to whom he represented himself as the beneficial owner of the equity of redemption. The plaintiff brought the present action for a declaration that the defendants had no interest in the leaseholds, and for delivery up of the assignments; and Chitty, J., made a decree in his favour, holding that the plaintiff's allowing Chuck to have the control of the assignment was not, under the circumstances, sufficient negligence on his part to defeat his prior equitable title; and that the ordinary recitals and forms commonly used in conveyances and assignments to trustees, with a view to keeping all notices of the trust off the title, were not mis-

representations on the face of the document which could displace the equitable title of the *cestui que trust*, even though they may have been fraudulently made use of by the trustee to show that he was in fact the absolute owner. We must confess, however, that after a perusal of this case it seems to us that the demands of natural justice would have been better satisfied if the decision had been the other way. If Chuck had conveyed to the defendants a legal title instead of a mere equitable one, then, we presume, following the maxim, *in æquali jure melior est conditio possidentis*, the defendants would have been held to have acquired a good title as against the plaintiff; and that being so, it is perhaps open to some doubt whether this distinction between legal and equitable titles rests on any solid basis of reason.

LEGITIMACY—PATERNITY OF CHILD BORN IN WEDLOCK—EVIDENCE TO BASTARDIZE CHILD—POWER OF APPOINTMENT—IN VALID APPOINTMENT.

Burnaby v. *Baillie*, 42 Chy.D., 282, may be referred to as showing the character of evidence which is admissible, to establish that a child born in wedlock is in fact a bastard. Evidence of verbal statements by the wife's paramour at the time of the birth of the child, was held to be admissible as evidence of conduct, tending to show that he was the father of the child. So also a copy of a public record in a foreign country which could not be removed, sworn to by a witness who had examined the copy with the original entry, was held to be admissible. Notwithstanding 32 & 33 Vict., c. 68, s. 3, which provides that the evidence of a husband and wife is admissible in a "proceeding instituted in consequence of adultery," it was held that the evidence of a husband is not admissible after the dissolution of the marriage on the ground of the wife's adultery, to prove the illegitimacy of a child born in wedlock. By a marriage settlement a power of appointment and revocation was reserved to the husband and wife; after a divorce the husband and divorced wife, in assumed exercise of the power, made an appointment reserving to the husband alone a power of revocation; and it was held that the reservation of the power of revocation to him alone was invalid.

TRUSTEE—EXECUTOR—LEGACY, WHEN IT BECOMES A TRUST FUND.

In re Smith, Henderson-Roe v. *Hitchins*, 42 Chy.D., 302, is deserving of notice as illustrating the rule that where a pecuniary legacy is given by a will, and the executor assents to it, or sets apart a fund to meet the legacy, it ceases to be a legacy and becomes a trust fund in his hands.

WILL—CONSTRUCTION—BEQUEST TO HUSBAND AND WIFE, AND THIRD PARTY.

In re Dixon Byram v. *Tull*, 42 Chy.D., 306, North, J., sheds some new light on the question discussed *In re March*, 27 Chy.D., 166, and *In re Jupp*, 39 Chy. D., 148, viz., the effect of a bequest to husband and wife, and others. Kay, J., *In re Jupp*, considered the rule of law to be settled that the husband and wife take but one share between them, and that The Married Woman's Property Act, 1882, has made no alteration in the law in this respect. North, J., on the

authority of *Warrington* v. *Warrington*, 2 Hare, 54, holds that the rule is by no means inflexible, and a very little indication to the contrary is sufficient to lead to an opposite construction. Thus the position in which the parties are named in the gift, and the position of the conjunction "and" have influenced the construction; and under similar words to those used *In re Jupp*, North, J., held that the husband and wife took two shares of the bequest, instead of one, between them. In this case the bequest was to A., and B., his wife; C., the wife of X.; D. the wife of Y.; E.; F., and G., his wife; and A. and B., and F. and G., were each held entitled to one seventh. In *Warrington* v. *Warrington* the testator left his residue "equally between my brother, Thornhill Warrington; my sister, Anne Von Cortlandt, widow; my nephew, William Henry Warrington, and Emma, his wife," and each were held entitled to a fourth share.

CHARITY—DEED VOID—TITLE BY POSSESSION—TRUSTEE.

In *Churcher* v. *Martin*, 42 Chy.D., 312, Kekewich, J., decided that although a deed to trustees, upon charitable trusts, was absolutely void under 9 Geo. II., c. 36, s. 3, yet that the trustees named in the deed, having entered into possession, and applied the rents and profits according to the trusts of the deed for more than twelve years before the commencement of the action, had acquired a good legal title as against the plaintiffs, who claimed under the grantor; and that although one of the trustees was the general devisee,and legatee of the grantor, the trustees could not be held to have been in possession as mere licensees of the devisee and legatee, and that the accident of his being one of the trustees did not operate to defeat their title.

Notes on Exchanges and Legal Scrap Book.

COMPLIMENT TO A CANADIAN JURIST.—Yesterday, upon the sitting of the Court of Chancery, the Lord Chancellor (Lord Ashbourne) called to the Bar of Ireland a gentleman who for some time past has been sojourning in this city, the Hon. Judge Gowan, Senator of Canada. Addressing Mr. Gowan, the Lord Chancellor said that in view of his past distinguished career he had great pleasure in calling him to the Irish Bar as a member of a profession in this his native country, which he ornamented in that of his adoption. The compliment was enhanced by the circumstance that the "call" was a special one. Incidents of the kind are rare in the history of the Irish Bar, but in Canada as in Ireland this event will be recognized as a tribute of respect to the legal learning of the Dominion, which thus in the person of one of its most prominent and respected representatives is peculiarly acknowledged.—*Irish Times.*

A COMMON-SENSE JUDGE.—"Although not over anxious to pay compliments to the judiciary, which, if the truth must be told, are not always deserved, we can not help referring to the favorable opinions everywhere expressed of

the learned judge who presided for the first time at the assizes last week. Mr. Justice Street is not a shirker of work, and from the outset showed a desire to try the causes before him, and not, as some judges do, to dispose of them. He opened court at 9.30 a.m., adjourned for an hour at midday, and usually rose from the bench at 7. p.m. This was a fair day's work and gave universal satisfaction. If the practice were more generally followed the legislature would not be called upon, as we understand it will be, to limit the working hours of our Courts of Assizes. The killing custom of one or two judges of sitting from early morning to all hours at night, with scarce an adjournment, is a positive injury to the administration of justice. Mr. Street is one of the latest acquisitions to the Bench and is, we believe, regarded by the legal profession as a well-read lawyer and one of the best of our judges. Those who observed his judicial demeanor and his conduct of public business will readily acquiesce in this estimate by the Bar of his fitness for his responsible position. To the general public not versed in legal lore he gave the impression of being a mild but firm and eminently fair dispenser of justice, patient, courteous and painstaking to the last degree and desirous in small matters as in great of doing his whole duty with the utmost consideration for counsel, witnesses and jurymen. These are indispensable qualities in an occupant of the Bench, however able and experienced, and when accompanied by learning and ability they never fail to win the confidence, respect, and personal regard of the public as well as of the profession."—*Berlin Telegraph.*

TRIALS IN CAMERA.—At the present Chancery Sittings at Toronto, Mr. Justice Ferguson in the case of *Smart* v. *Smart*, excluded the reporters and general public from the court-room, and tried the case with closed doors. A similar proceeding by Mr. Justice Denman in *Malan* v. *Young*, which was an action for damages for alleged libel by the master of Sherbourne School upon an assistant, raises the question whether the Judge at the trial has the power to order the public to be excluded from the court-room. We cite the following on the point from the *Law Journal* for Nov. 16: "On November 11, before Mr. Justice Denman and a special jury, the action of *Malan* v. *Young* was called on for trial, to recover damages for alleged libels and slanders by the head-master of Sherbourne School against an assistant-master. The jury having been sworn, Sir C. Russell, Q.C., said that with the consent of Mr. Lockwood, Q.C., in the interest of third parties, he would ask his Lordship to try the case *in camera*. The Divorce Court had no special power to try cases in that way, and with the consent of both parties, he would ask that that course should be adopted. Mr. Justice Denman: 'Wilson's Judicature Acts' seems to doubt the power to examine any case *in camera*, except in cases affecting lunatics and wards of Court, or where the old ecclesiastical procedure continues, or where a public trial would defeat the object of the action. *Nagle-Gillman* v. *Christopher*, 46 Law J. Rep. Chanc. 60; L. R. 4 Chanc. Div. 173, and *Andrew*

v. *Raeburn*, L. R. 9 Chanc. App. 522, where the Court were of opinion they had power, the consent of both parties being immaterial, also *Mellor* v. *Thompson*, 55 Law J. Rep. Chanc. 942; L. R. 31 Chanc. Div. 55, and *Badische Anilin und Sodafabrik* v. *Levinstein*, 52 Law J. Rep. Chy. 704; L. R. 24 Chy. Div. 156, where the Court, being of opinion that a certain patent was valid, gave the defendant leave to state his secret process *in camera*, the shorthand-writer's notes being impounded, were cited, whereupon the learned judge said: I will consult some of the other judges before I decide this matter.—Shortly afterwards the learned judge returned into Court, and said he would try the case *in camera*, without a jury, by consent. He had come to the conclusion that he could have ordered such a trial with a jury if it had been desirable. The Court was then ordered to be cleared. Mr. Charles Gould, barrister-at-law, objected to leave the Court. Mr. Justice Denman: On what grounds? Mr. Gould: As a member of the public and the father of sons at school. Mr. Justice Denman: Have you anything to do with this case? Mr. Gould: No. Mr. Justice Denman: Then I must order you to leave the Court, Mr. Gould. Mr. Gould: I protest, my lord. Mr. Justice Denman: I hear your protest, and order you to leave the Court, or I must get the ushers to remove you. Mr. Gould then retired, and the hearing of the case proceeded *in camera*. The reasons which induced the learned judge to this course are hardly to be found in the precedents cited to him. The words he cited from 'Wilson's Judicature Acts,' as the expression of a doubt whether there is such a jurisdiction, were not the expression of a doubt, but the very decided opinion, somewhat watered down by the writer, of the late Master of the Rolls, expressed in the case of *Nagle-Gillman* v. *Christopher*, 46 Law J. Rep. Chy. 60, upon the suggestion made in the opening speech of the plaintiff's counsel that the plaintiff's wife should be examined in private. Sir George Jessel said that he was of opinion that the Court had no power to try any cases in private, even with the consent of the parties, except cases which related to lunatics or wards of Court and cases in which the whole object would be defeated by a trial in public, as was suggested in *Andrew* v. *Raeburn*, L. R. 9 Chy. Div. 522, and cases in which the practice of the Ecclesiastical Courts was preserved under the jurisdiction of the Divorce Act (20 & 21 Vict. c. 85)—namely, suits for nullity of marriage or judicial separation. *Andrew* v. *Raeburn* contained a dictum of Lord Cairns to the same effect, and *Mellor* v. *Thompson*, 55 Law J. Rep. Chy. 942, was a decision of Lord Halsbury and Lords Justices Bowen and Fry, that if a public hearing of a case would defeat the object of the appeal and render its success useless to the plaintiff, the Court has jurisdiction to hear the case in private without the consent of the defendant. In *Badische Anilin und Sodafabrik* v. *Levinstein*, 52 Law J. Rep. Chy. 704; L. R. 24 Chy. Div. 156, the defendant had leave to state a secret process of manufacture in private. No other cases or statutes were cited in Court. The Matrimonial Causes Act, 1857 (20 & 21 Vict. c 85), s. 22, destroys Sir Charles Russell's argument that the Divorce Court has no special power to try *in camera*. It provides that, in all suits and proceedings other than proceedings to dissolve a marriage, the Court shall proceed and

act and give relief on principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief. That the rules of the Ecclesiastical Courts differed from those of the common law is common knowledge. These considerations appear to exhaust the cases and arguments addressed to the Court, but there are other authorities which should have been brought to the attention of Mr. Justice Denman. In *Barnett* v. *Barnett*, 29 Law J. Rep. P. &. M. 28, Sir Cresswell Cresswell, the founder of the practice in the Divorce Court, of which he was the first judge, explains in measured words, in view of Lord Chancellor Campbell having, when presiding over the full Court, heard two cases in private, that he had proposed a clause in the Divorce bill providing that the Court when for the sake of public decency it should so think, might hold its sitting with closed doors, which clause was rejected by Parliament. He added that he should, as was frequently done by other Courts, order women and children to leave the Court. A few days afterwards the judge ordinary sat in *H.* v. *C.*, 29 Law J. Rep. P. & M. 29, with Mr. Justice Williams and Baron Bramwell and adhered to the same views. His colleagues concurred in the view that the Court was to be considered to have all the incidents of an ordinary Court of justice, one of which is that its proceedings must take place in public, and Baron Bramwell said that the only doubt was that on two occasions the Court had sat in private with the consent of both parties and without discussion. In 1869, when Sir James Wilde, now Lord Penzance, was judge ordinary, in *C.* v. *C.*, 38 Law J. Rep. P. & M. 29, he declined to allow a suit for a dissolution of marriage to be tried with the consent of the parties *in camera*, on the ground that he had no jurisdiction, and added that, by the practice of the Ecclesiastical Courts, suits for nullity alone were heard *in camera*. In 1875, in *A.* v. *A.*, 44 Law J. Rep. P. & M. 14, Sir James Hannen expressed the view of Sir Cresswell Cresswell in *H.* v. *C.* as being, 'My own impression is that we have no power to hear any case otherwise than in open court.' This passage does not occur in the *Law Journal* report of *H.* v. *C.* and Sir Cresswell Cresswell is reported to have said merely that he adhered to the opinion he had given in *Barnett* v. *Barnett*. The words cited by Sir James Hannen, as the judge ordinary's are very like those given in the report in *Law Journal* reports to Mr. Justice Williams—namely, 'I am of opinion that we have no power to hear the case except in open Court.' These discrepancies seem to throw some doubt on the exactness of the views expressed by Sir James Hannen, that any impression first entertained was afterwards abandoned or removed from the mind of Sir Cresswell Cresswell himself. No doubt Sir James, in *A.* v. *A.*, decided that there might be a sitting *in camera* in cases not for dissolution of marriage other than suits for nullity, which is the position of Sir Cresswell Cresswell, Mr. Justice Williams, and Baron Bramwell. The point involves an investigation into the old ecclesiastical practice in the matter, and Sir James says that he did not believe that it appears that the old Courts ever did, in fact, hear a case *in camera* merely because it involved the investigation of a charge of unnatural practices. It may be a step from Sir Cresswell Cresswell to Sir James Hannen,

but it is a long step indeed from Sir James to the step now taken by Mr. Justice Denman."

MARRIED WOMAN'S APPAREL AS SEPARATE PROPERTY.—In *Leake* v. *Duffield*, reported in the *Times* of the 9th inst, the curious and rather important question, whether a married woman's clothes are her separate property, within the meaning of the Married Woman's Property Act, 1882, was raised before Mathew and Wills, JJ. It appears that the plaintiffs were drapers and milliners, and had obtained judgment in a County Court action against the defendant, who was then a divorced woman, in respect of a debt for goods sold and delivered to her previous to the divorce. The defendant was married on May 12, 1867, being then aged 17. Previous to her marriage a settlement was executed under which she was entitled to the income of about £2,800 in Consols for her separate use without power of anticipation; a reversionary interest in personalty on the death of her mother was also covenanted to be assigned on certain trusts. This had not yet fallen into possession. When she came of age she executed a deed of confirmation of the settlement. After the marriage the husband and wife lived at Huntingtonhall, near York, and had several children, some of whom are still under age. About 1882 they moved to a smaller house called the Hut. Pecuniary difficulties arose, and in November, 1884, at an interview between the husband, wife, and their solicitor, it was arranged that the defendant, who had up to that time paid for her own clothes out of her separate income, should also pay for the clothes of all the children, except the eldest, out of it. The defendant had dealt with the plaintiff for years, and with the exception of 1s. they were paid for everything up to March 1, 1884. From that day till May 24, 1886, the defendant purchased goods to the amount of £21 19s. 10d. at the plaintiffs' shop. The goods were mostly clothing, but some, such as mats and cocoa-matting, must have been for the house. The goods, with one unimportant exception in the case of the daughter, were entered to the account of the defendant. Previous to this bill being incurred the defendant's solicitors in May, 1882, paid the plaintiffs, at the defendant's request, £5 on her account out of her separate income. No payment on account of the present bill had ever been made. On July 9, 1885, in answer to a request, the defendant wrote this note:—"Mrs. Duffield will call and pay Messrs. Leake and Thorpe their account as soon as she returns from London." The plaintiffs enter goods to married ladies and send in accounts monthly to them. No application was made to the husband. He was living at the Hut all this time with the defendant. After the last of the goods sued for were got the marriage was dissolved by a decree absolute of May 29, 1888; from which time it is that, in such case, the statute is held to operate: *Norman* v. *Villars*, 2 Ex. D. 359. Now, section 1, sub-s. 1 of the statute (45 & 46 Vic. c. 75) enacts that "a married woman shall be capable of acquiring, holding, and disposing by will or otherwise of any real

or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee;" sub-s. 3 providing that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown;" while, according to sub-s. 4, "every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." The learned County Court Judge held that, while the defendant had spent her income up to the time when the first of the goods were ordered, she had spent it in clothes, and that some of these clothes still existed, and they were therefore her separate property; and he gave judgment for the plaintiffs for £21 19s. 10d., such sum to be payable out of her separate property, and execution was ordered to be limited to the separate property belonging to the defendant on May 29, 1888 (the date of the decree absolute), and which was not on that day subject to any restriction against anticipation. An appeal was now taken from this decision; the contention being, on behalf of the appellant, that, as when she was sued the defendant was a divorced woman, the restraint on anticipation was gone, and any and every part of her property became liable to execution if the contention of the plaintiffs were right; but it was not right—she could not be said to have any free separate property at the time when the goods were ordered, as her income was all spent and she had only the clothes she had bought and which were not separate property. On the other hand, on behalf of the plaintiffs, it was contended, that if the defendant had any separate property whatever of her own, whether clothes, money, or even if it were only a wedding ring, at the time when she gave the orders, that property and any after-acquired separate property was liable for the debt. But, against this it was urged that no such consequence followed under the statute, and that, at all events, the liability was only where there was a reasonable ground for presuming that the contract was, or might have been made with reference to the separate property. The terms of section 1, sub-s. 3, however, unquestionably create a suitable presumption now, that a married woman's contract binds her separate property; and the result of the legislation was thus put in Griffith's work on the Acts,—"The married woman's separate property will now, it is submitted, be liable, for her contracts, express or implied, just as if she were unmarried; whether the contract is made while she is living with, or while she is living apart from, her husband; unless she can show that she did not contract in reference to that separate property, but merely as the agent of her husband; and such contracts will be as valid as if she had entered into them while unmarried." Here, at the time of the contract the defendant had, as separate property (1st), property under her marriage settlement restrained from anticipation; but such property is inalienable (*Harrison* v. *Harrison*, 13 P. D, 180), and it would not be reasonable to presume that the contract was entered into "with respect to, or to bind" that. But (2nd), she had her clothes, and those of her children. And though it was argued that the plaintiffs had not to

prove the existence of any property liable, the onus of doing so lay upon them, according to *Palliser* v. *Gurney* (19 Q. B. D. 519); and beyond the property thus proved they had not shown the existence of any separate property, The County Court Judge had found as a matter of fact, and based his judgment on it, that the only separate property in the defendant's possession consisted of her clothes. But said Mr. Justice Mathew, "the fact that all the property the defendant had was clothes precluded the suggestion that the contract was entered into in respect of that property," his opinion being that it was unreasonable to presume that she meant to bind such property as that. "Was it possible," said Mr. Justice Wills, "that either she or any one dealing with her had in respect of her or her children's clothes any intention that those clothes should be security for a debt? Such a question answered itself. The result was as if there was no separate property at all. This gave a reasonable construction to the Act and avoided the consequences that would accrue if Mr. Scott Fox's argument were accepted. That would have deprived married women of any protection by restraint on anticipation. The Legislature could not have meant that. Such a change would have been put in the clearest language possible. Under the circumstances a judge could not think there was any reasonable inference that the defendant's apparel or that of her children was intended to be pledged." And judgment (reversing the decision of the County Court Judge) was entered for the defendant accordingly.—*Irish Law Times.*

LEGAL HUMOUR.—*The Green Bag* has a very entertaining column entitled, "Facetiæ," in which the editor records the "jokes" and "humours of the law." Some of them are ancient and of long standing, but worth retelling. We extract the following from the November number:—

Judge Kent, the well-known jurist, presided in a case in which a man was indicted for burglary; and the evidence at the trial showed that the burglary consisted in his cutting a hole through a tent in which several persons were sleeping, and then projecting his head and arm through the hole and abstracting various articles of value. It was claimed by his counsel that inasmuch as he never entered into the tent with his whole body, he had not committed the offence charged, and must therefore be set at liberty. In reply to this plea, the judge told the jury that if they were not satisfied that the whole man was involved in the crime, they might bring in a verdict of guilty against so much of him as was involved. The jury, after a brief consultation, found the right arm, the right shoulder, and the head of the prisoner guilty of the offence of burglary. The judge accordingly sentenced the right arm, the right shoulder, and the head to imprisonment with hard labour in the state-prison for two years, remarking that *as to the rest of the man's body, he might do with it as he pleased.*

DIARY FOR DECEMBER.

1. Sun.....*1st Sunday in Advent.*
3. Tues...General Sessions and County Court Sittings for Trial in York.
5. Thu....Chancery Division High Court of Justice sits.
7. Sat.....Michaelmas Term and High Court of Justice Sittings end. Last day for call notices for Hiliary Term. Sir W. P. Campbell, 6th C.J. of Q.B., 1825.
8. Sun.....*2nd Sunday in Advent.*
10. Tues...General Sessions and County Court Sittings for Trial, except in York.
14. Sat.....Prince Albert died, 1861.
15. Sun.....*3rd Sunday in Advent.*
17. Tues...First Lower Canadian Parliament met, 1792.
18. Wed...Slavery abolished in the United States, 1862.
21. Sat.....Shortest day.
22. Sun.....*4th Sunday in Advent.*
24. Tues...Christmas Vacation begins.
25. Wed...Christmas day. Sir M. Hale died, 1676, æt 67.
27. Fri.....J. G. Spragge, 3rd Chan., 1869.
29. Sun.....*1st Sunday after Christmas.*
30. Mon....Holt, C.J., born 1642.

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

From Surr. Ct. Co. Peel.] [Nov. 12.

LINFOOT *v.* LINFOOT.

Before the certificate of judgment in this case noted *ante* p. 543, was issued, the Court further considered the question of costs and ordered the respondent to pay the appellant his costs of the appeal and of the application in the Court below.

From Q.B.D.] [Nov. 12.

GRANT *v.* CORNOCK.

Husband and wife—Breach of Promise of marriage — Justification of breach — Statute of Limitations.

Want of bodily chastity is the only justification for breach of a promise to marry.

The use by the woman of coarse, obscene, and profane language and her indulgence in profane swearing would not justify the refusal to marry.

Quære—Whether evidence of such matters can be admitted in mitigation of damages?

Mere lapse of the time fixed for the marriage is not necessarily a breach of the promise. There must be a refusal or something equivalent to a refusal after the time fixed for performance before the Statute of Limitations begins to run.

Judgment of the Queen's Bench Division, 16 O.R., 406, affirmed.

Robinson, Q.C., and *Shepley* for the appellant.

W. Nesbitt and *Aytoun-Finlay* for the respondent.

From ROBERTSON, J.] [Nov. 12.

SANFORD *v.* PORTER.

Trustee—Assignee for the benefit of creditors—Duty as to keeping and furnishing accounts —Misconduct disentitling to costs—Solicitor and client—Taxation by cestui que trust of bill of solicitor employed by trustee.

It is the duty of the trustee or other accounting party to at all times have his accounts ready, to afford all reasonable facilities for their inspection and examination, and to give full information whenever required. As a general rule he is not obliged to prepare copies of his accounts for the parties interested, though if, for example, the *cestui que* trust or principal lives at a distance from where the trust affairs are being carried on, or in a foreign country, it would be the duty of a trustee to give all reasonable information and explanation by letter, and even, if requested, but at the expense of the *cestui que* trust, to prepare and transmit accounts and statements.

Any one *cestui que* trust may, in the discretion of the Court, obtain an order under the third party clauses of the Solicitors' Act for the taxation of a bill of costs for business connected with the trust estate of a solicitor employed by the trustee.

Where a creditor brought an action for an account against the assignee for the benefit of creditors of his debtor, after demanding copies of the assignee's accounts but without expressing any desire or making any attempt to inspect the accounts, and without waiting a reasonable time for preparation of copies, the assignee was allowed his costs as between solicitor and client out of the balance of the estate in his hands, and in case of deficiency the plaintiff was ordered personally to pay it.

The mere fact that a trustee in rendering an account to his *cestui que* trust claims that he has in his hands a smaller sum than is found to be due by him when his accounts are taken in Court, does not disentitle him to the costs of an action against him for an account when the

cestui que trust who brings the action has not before action taken objection to the items that are afterwards disallowed.

Judgment of ROBERTSON, J., affirmed.

C. J. Holman and *Washington* for the appellants.

M. G. Cameron and *W. M. Douglas* for the respondent.

From BOYD, C.]

BLACKLEY *v.* KENNEY.

Voluntary conveyance — Creditor with whose knowledge and assent it is made cannot complain—Mortgage to secure past and future advances–Mortgagee after notice of voluntary conveyance cannot charge land with further advances.

Where a debtor, at the express instance and under the advice and with the assent of a creditor who holds, to secure past and future advances, a mortgage upon certain of the debtor's land, makes a voluntary conveyance of his equity of redemption in that land to his wife, that creditor cannot afterwards contend that the conveyance is voluntary, and void as against him.

Nor can the creditor charge against the land under his mortgage any advances made after notice of the voluntary conveyance.

Order of BOYD, C., reversed.

A. C. Galt for the appellants.

Walter Macdonald for the respondent the plaintiff.

Geo. Kerr, Jr., for the trustee for creditors.

From BOYD, C.] [Nov. 12.

IN RE THE ZOOLOGICAL AND ACCLIMATIZATION SOCIETY. COX'S CASE.

Company—Subscriber—Shareholder—Contributory—R.S.O., c. 157.

C., after the incorporation of a Company under the Ontario Joint Stock Companies Letters Patent Act, signed a share subscription book with the following heading :

"We the undersigned do hereby severally on behalf of ourselves our and each of our several and respective executors and administrators, acknowledge ourselves to be subscribers to the Capital Stock of the Zoological and Acclimatization Society of Ontario for the number of shares and to the amount set opposite our several and respective names and seals hereunder, and we do hereby covenant, promise and agree each with the other of us, and with S., to pay the amount of our said several subscriptions and all calls thereon when and as the same may be called up and made under the provisions of the Ontario Joint Stock Companies Letters Patent Act, or under any by-laws which may be passed by the said Company, and we request the number of shares for which we subscribe hereunder to be allotted to us."

No shares were allotted to C., he was not entered in the books of the company as a shareholder, and never made any payments. Four years after this document was signed by C. the company was wound up, and he was held liable as a contributory.

Held, that this document did not, in the absence of any recognition by the company of C.'s position as a shareholder, alone and *ex proprio vigore* create the liability contended for.

Order of BOYD, C., 17 O.R., 331, reversed.

A. C. Galt for the appellant.

W. F. W. Creelman for the respondent.

From BOYD, C.]

ROSS *v.* DUNN.

Assignments and preferences—Chattel mortgage —Present advance--Following proceeds where mortgaged goods sold — Security taken by partner in his own name to secure partnership debt—Debt represented by paper under discount—Affidavit of indebtedness.

J. D. being indebted to W. D. & Co. in the sum of $2,260 for which W. D. & Co. held his unmatured notes under discount in a bank, applied to them for an advance to enable him to carry on business. They in good faith agreed to advance $1,000, and D. made a chattel mortgage in favour of W. D., the senior partner of the firm, purporting to secure an indebtedness of $3,260. A cheque for $1,000 was given to J. D., and held by him for some six months and then returned to W. D. & Co., he in the meantime, in pursuance of an arrangement made when the cheque was given, drawing on W. D. & Co. from time to time as he required money until he had drawn in all more than $1,000. W. D. made the affidavit in the usual form that J. D. was indebted to him in the sum of $3,260. The goods covered by the

chattel mortgage were sold under it while the plaintiff's execution was in the sheriff's hands.

Held, that W. D. could properly take the mortgage in his own name and make the affidavit of indebtedness, though the debt was due to the partnership and partly represented by unmatured paper; that the mortgage was one to secure a present actual advance; and therefore that it could not be impeached under the Chattel Mortgage Act.

Held, also, that it could not be impeached under the Assignments and Preferences Act, because the advance was made in the *bona fide* that J. D. would thereby be enabled to continue his business and pay his debts in full.

Held, also, per BURTON and OSLER, JJ.A., that the goods having been sold, an action against the mortgagee to make him account for the proceeds could not be maintained by the execution creditor even if the mortgage were invalid; his remedy, if any, would be to follow the goods.

Judgment of BOYD, C., affirmed.

Lash, Q.C., and *D. L. McLean* for the appellants.

Moss, Q.C., for the respondents.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Div'l Ct.] [Nov. 13.

IN RE MARTER AND THE COURT OF REVISION OF THE TOWN OF GRAVENHURST.

Mandamus—Compelling Court of Revision to hear voters' lists appeals—Specific remedy by appeal to county judge—51 Vict., c. 4, s. 13, s.s. (1)—R.S.O., c. 193, s.s. 61, 68.

By section 13, sub-section (1) of the Manhood Suffrage Act, 51 Vict., c. 4, it is provided that complaints of persons not having been entered on the roll as qualified to be voters who should have been so entered, may by any person entitled to be a voter or to be entered on the voters' list, be made to the Court of Revision as in the case of assessments, or the complaints may be made to the County Judge under the Voters' Lists Act.

By s. 61 of the Assessment Act, R.S.O., c. 193, it is provided that the Court of Revision of each municipality shall meet and try all complaints in regard to persons wrongfully omitted from the roll, and by sec. 68, s.s. (1), that an appeal to the County Judge shall lie not only against a decision of the Court of Revision on an appeal to that court, but also against the omission, neglect, or refusal to said Court to hear or decide an appeal. The Court of Revision of a municipality refused to hear or adjudicate upon a complaint made by M. under sec. 13 of the Manhood Suffrage Act, that the names of certain persons had been wrongfully omitted from the assessment roll.

Held, that it was the duty of the Court of Revision under sec. 61 to try the complaint made by M.; and that if no other complete, appropriate, and convenient remedy had existed M. would have been entitled to a mandamus to compel the court to perform its duty; but as the Legislature by sec. 68 had given a specific remedy for this very breach of duty, by appeal to the County Judge, M. was not entitled to a mandamus.

The right which M. was seeking to enforce was to have the names of certain persons placed on the assessment roll; not, as was contended, to have his complaint disposed of by the Court of Revision; the complaint to the Court of Revision was a means of enforcing his right, not the right itself.

McCarthy, Q.C., and *Pepler* for Marter.

Moss, Q.C., for members of Court of Revision.

Chancery Division.

Div'l Ct.] [Oct. 8.

THE CORPORATION OF THE TOWNSHIP OF BARTON *v.* THE CORPORATION OF THE CITY OF HAMILTON.

Municipal Corporations — Drainage through adjacent municipality—Arbitration—"Territory"—R.S.O. c. 184, sec. 492, s.s. 2.

Municipality cannot construct a sewer through an adjacent municipality against the will of the latter, without first settling the terms by arbitration, even although a purchase was made from the private owners of the land through which the sewer was to be constructed.

"Territory" in sec. 492, s.s. 2, R.S.O. *c.* 184, is not used to signify land belonging to the

corporation as owners, but land within their territorial ambit over which they have municipal jurisdiction.

S. H. Blake, Q.C., and *Wm. Bell* for the plaintiffs.

Moss, Q.C., and *J. M. Gibson* for the defendants.

Div'l Ct.] [Oct. 19.

SCOTT *v.* STUART.

For sale—Patented lands advertised and sold as unpatented.

Certain lands were sold for taxes, and were described by the Treasurer in the advertisement and in the tax deed as unpatented, although as a matter of fact they were patented. It was shown in evidence that the effect of such a description was that lands would sell for a merely nominal price.

Held, affirming BOYD, C., that the sale was bad and the deed must be set aside.

J. C. Hamilton and *Thos. Dixon* for the plaintiffs.

Creasor, Q.C., for the defendants.

STREET, J.] [Oct. 19.

ALBRECHT *v.* BURKHOLDER.

Slander—Words applicable to class of two—Law of Slander Amendment Act, 1889—Right of action.

Action for slander under Law of Slander Amendment Act, 1889, for saying that he (the defendant) had heard one Brayley "had got one of the Albrecht girls (meaning the plaintiff) in trouble."

The plaintiff was one of four daughters of Ferdinand Albrecht, two of whom were mere children ; and though the evidence showed that there were circumstances which might lead persons to think that the words referred to the plaintiff, yet it also showed that the person to whom they were actually spoken was not aware of these circumstances, and had no reason, therefore, to understand them as referring to the plaintiff.

Held, however, that either the plaintiff or her sister, being the only two of Albrecht's daughters to whom the words could apply, was entitled to maintain the action ; but it was necessary for her to prove that the words were untrue of her sister, the other member of the class to which the hearer might have applied them, and having failed to do this here, the action must be dismissed.

Mackelcan, Q.C., for the plaintiff.

Osler, Q.C., for the defendant.

BOYD, C.] [Oct. 23.

DISHER *v.* CANADA PERMANENT L. & S. CO.

Hirereceipt—Lien for engine—Mortgage—Surplus—Part of dower—Second mortgage.

Certain lands were subject to a first mortgage, a lien registered by the Waterous Engine Co. in respect to an engine supplied by them, and a second mortgage registered subsequently to the lien ; and the lands having been sold, a contest arose in this action in respect to the surplus left after satisfaction of the first mortgage.

The Engine Company had sold the engine, and now claimed the balance of the price under the lien.

Held, that they were entitled to make that claim, but that having sold the engine without notice to the second mortgagee, the latter was entitled to impeach that sale by shewing that a greater sum could have been realized, if it had been properly sold after proper notice. But

Held, that the second mortgagee was alone entitled to the value of the interest of the wife of the owner of the equity of redemption in the land as inchoate doweress; inasmuch as she had barred her dower in his favour, whereas she had not signed the agreement with the Waterous Co. In the absence of arrangement the value of this interest must be ascertained and retained in court, to be paid out to the second mortgagee if the right of dower attached by the wife surviving her husband, and to the Waterous Company if it did not attach.

H. T. Beck for the plaintiff.

Hoyles for the Waterous Company.

Macdonell for the defendants.

Practice.

Court of Appeal.] [Nov. 12.

NIAGARA GRAPE CO. *v.* NELLIS.

Consolidation of actions—Staying actions—Identity of issues—Leave to appeal.

An order to consolidate, strictly so called, is a matter of discretion, and is made as a favour to and for the benefit of the defendants, the

object being that a single trial may decide that which is in fact only a single question, and thus save costs and expense. No such order ought to be made unless the questions in each case are substantially the same, and the evidence would be substantially the same if they were all tried.

Leave to appeal from the order of the Queen's Bench Divisional Court, 13 P.R. 179; *ante* p. 412 was refused.

McCarthy, Q.C., for the defendants.

C. J. Holman for the plaintiffs.

STREET, J.] [Nov. 20.

RE COLENUTT AND TOWNSHIP OF COLCHESTER NORTH.

By-law—Procedure on motion to quash—Notice of motion—Order nisi—Rule 526.

The authority to proceed by rule or order *nisi* in quashing a by-law conferred by R.S.O., c. 184, sec. 332, is inconsistent with Con. Rule 526, and must therefore be taken to be repealed; for by 51 Vict., c. 2, sec. 4 (O.), it is declared that all enactments in the Revised Statutes inconsistent with the Rules are repealed.

It is therefore not now proper to proceed by order *nisi*.

In re Peck and Ameliasburg, 12 P.R. 664, followed.

Hewison v. *Pembroke*, 6 O.R. 170, distinguished.

Langton for applicant.

W. H. Blake for Township.

Appointments to Office.

CORONER.

Oxford.

N. Hotson, of Innerkip, in the County of Oxford, M.D., to be an Associate-Coroner within and for the said County of Oxford, *vice* J. P. Rankin, M.D., removed from the County.

DIVISION COURT CLERKS.

Elgin.

A. McBride, of St. Thomas, to be Clerk of the Second and Third Division Courts of the County of Elgin, on and from the 1st day of January, A.D. 1890, *vice* C. Askew, resigned.

BAILIFFS.

Elgin.

D. McGregor, of Aldborough, to be Bailiff of the Fourth Division Court of the County of Elgin, *vice* J. McCallum, resigned.

Victoria.

I. Thornton, of Omemee, to be Bailiff of the Fourth Division Court of the County of Victoria, *vice* G. A. Balfour, resigned.

Bruce.

J. McRitchie, of Ripley, to be Bailiff of the Ninth Division Court of the County of Bruce, *vice* D. McDonald, resigned.

Law Students' Department.

EXAMINATION BEFORE MICHAELMAS TERM, 1889.

FIRST INTERMEDIATE.

Anson on Contracts—Statutes.

Examiner—R. E. KINGSFORD.

1. An offer not made to an ascertained person but accepted by an ascertained person. Illustrate by example, and explain the rule whereby a contract is held to have arisen.

2. A. makes a promissory note to B., dated 31st October, 1889, payable "one month after date." When is it due? Why?

3. A. enters into a contract under seal with B.: at the time of the execution of the agreement there is no consideration therefor: when A. is sued by B. on the contract he pleads no consideration. How far can the defence avail? Why?

4. "A man cannot assign his liabilities under a contract." How far is this statement true?

5. How far can a simple contract be waived before breach without consideration?

6. In the case of an executed contract of sale, what remedy has the buyer if the article prove worthless or unmarketable?

7. How far is a person liable for debts contracted by him during infancy, but disputed after he comes of age? Why?

Smith's Common Law.

Examiner—R. E. KINGSFORD.

1. What is meant by *Recaption?* Explain fully.

2. When will a marriage be *void* and when *voidable* by reason of the age of the parties?

3. Explain what is meant by an executor's right of *retainer*.

4. Explain and distinguish the actions for *false imprisonment* and *malicious prosecution*.

5. Name the six principal kinds of *injury to real estate*, and explain the nature of each.

6. Explain the meaning of *privileged communications* in cases of slander.

7. What are the rules as to the owner's liability for *trespass by animals?*

Equity.

Examiner—P. H. DRAYTON.

1. Explain and illustrate the maxim that equality is equity.

2. A. and B., residents of Toronto, enter into a binding agreement whereby B. agrees to purchase from B. a farm of his in British Columbia. B. afterwards refuses to carry out the contract. Has A. any remedy? Explain fully.

3. A., the trustee under will of B., deposits and keeps deposited with his own account, at a bank in good standing, the trust funds of the estate. The bank afterwards fails, and depositors only obtain fifty per cent. of their deposits. State the relative rights of A. and the *cestui que* trust. Reasons.

4. What is a *donatio mortis causa?* In what respect does it differ from a legacy?

5. A. by will bequeaths a sum of money for charitable purposes to "my executor hereinafter named." He names none. What becomes of the bequest? Explain.

6. Under what circumstances, if any, will the Court interfere in the non-execution of a power?

7. What is meant by cy-pres doctrine? Illustrate.

Real Property.

Examiner—P. H. DRAYTON.

1. Distinguish between a reversion and a remainder.

2. Explain the Doctrine of Merger.

3. What was the origin of Uses? Why was the Statute of Uses enacted?

4. What was the object and effect of the Statute *Quia Emptores?*

5. Distinguish between an estate by joint tenancy and an estate by tenancy in common.

6. What is meant by a term of years?

7. What is meant by a resulting use?

SECOND INTERMEDIATE.

Broom's Common Law.

Examiner—R. E. KINGSFORD.

1. What is the law as to a master's liability for a *wilful* tort committed by his servant? Give examples.

2. In what cases is an infant liable for his torts?

3. What is essential to the validity of a *custom?*

4. Explain the difference between the actions of *slander* and *malicious prosecution*, in regard to the question of malice.

5. What is the difference between the remedies for a *public nuisance* and a *private nuisance*, and what is the reason of the difference?

6. What distinction in the remedy is there against a magistrate who acts erroneously within his jurisdiction from that against a magistrate who acts without jurisdiction?

7. What is the law as to the liability of a government officer for an injury caused by him to another in carrying out the orders of the government?

Personal Property.—Judicature Act.

Examiner—R. E. KINGSFORD.

1. What were the rights of a husband over his wife's personal property, and what are they now?

2. A gift of personal property to A. for life, and after his decease to B. What estate do A. and B. take respectively?

3. In what cases can only the bailee of goods maintain an action against a person who has taken the goods and converted them to his own use? Why?

4. In what cases must there be a trial by jury unless the parties waive same?

5. How far can a plaintiff amend his statement of claim without leave?

6. Where a judgment is against partners, how may execution issue?

7. What statutory requisites in case of a chattel mortgage executed to secure against endorsement of a promissory note and renewals?

Equity.

Examiner—P. H. DRAYTON.

1. A. verbally agrees with B. to sell him the farm of which B. is tenant: afterwards he

refuses to carry out the verbal agreement. Under what, if any, circumstances would B. be able to successfully bring an action of specific performance?

2. State the general principles which govern in determining whether a legacy to a creditor is a satisfaction, or part satisfaction of a debt due him.

3. Define and distinguish between the equitable doctrines of satisfaction and performance.

4. A. contracts with B. to lecture for him on a certain subject during a specified period, and for no one else. He afterwards commences lecturing on the subject agreed upon for C. Can B. compel specific performance of the contract to lecture for him alone? if not, has he any remedy?

5. Distinguish briefly the rights of solicitor and trustee to deal with clients, and *cestui que trust*, respectively.

6. Define constructive fraud, and illustrate by an example.

7. Explain the maxim "Equity acts *in personam*," and illustrate by an example.

Real Property.

Examiner—P. H. DRAYTON.

1. By what tenure are lands held in Ontario? Why?

2. Distinguish between a tenant at suffrance and a tenant at will.

3. State the rules given by which you can determine whether or no an express covenant in a conveyance runs with the land.

4. A lease to "A." for life, remainders to B. for life. What estate does B. take? Reasons for your answer.

5. Explain what is meant by a base or qualified fee.

6. Why is it necessary that there should be a consideration in a deed of bargain and sale?

7. Distinguish between a *condition* in *deed* and a *limitation*.

CERTIFICATE OF FITNESS.

Benjamin on Sales and Smith on Contracts.

Examiner—R. E. KINGSFORD.

1. How far is parol evidence admissible, (*a*) to shew that a written contract has omitted a material term of the bargain: (*b*) to shew that an additional term was verbally agreed to after the contract was made. Why?

2. Explain the difference as regards the passing of the title between the sale of a specific chattel and of unascertained goods.

3. What warranty and what condition does the law imply on a sale of goods by sample?

4. How far does delivery of goods to a carrier constitute an *acceptance* and *receipt* to satisfy the Statute of Frauds?

5. Explain the difference between a *Condition Precedent* and a *Warranty*.

6. What are the general grounds of *illegality* in contracts at common law?

7. In what ways may a sale on trial become an absolute sale?

9. When the vendor sends a larger quantity of goods than the purchaser ordered, what are the rights of the latter?

9. Goods which have been sold remain in possession of the vendor. The vendee having made default in payment of the price the vendor re-sells the goods. Is he liable to an action by the vendee? If so, in what way, and for what amount?

10. How far is a verbal acceptance of a written offer of goods worth $1,000 binding on vendor and vendee respectively?

Law Society of Upper Canada.

TRINITY TERM, 1889.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained

from the Secretary of the Society, or from the Principal of the Law School, Osgoode Hall, Toronto.

Those Students-at-Law and Articled Clerks, who under the Rules are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein accompanied by those directions which appear to be the most necessary for the guidance of the student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.

Lecturers, E. D. ARMOUR. A. H. MARSH, LL.B.

Examiners, R. E. KINGSFORD, LL.B. P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the Rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1860, fourteen Scholarships in all will be offered for competition, seven of those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students.

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School:

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hiliary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has

been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum:

CURRICULUM.

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Smith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.

The Canada Law Journal.

VOL XXV. DECEMBER 31, 1889. No. 20

WE publish with this number the Index of subjects and tables of cases for the current volume. The Sheet Almanac will be sent with the number to be issued early in January.

A CORRESPONDENT speaks of the triumph of law over evidence, as illustrated by the following incident related in one of the papers in London, Eng. A man was indicted at one of the courts there for some criminal offence. The Grand Jury returned no bill. The Judge, however, thought the evidence so clear and strong, that, on the presumption that some mistake had been made, he sent it again to the Grand Jury with an intimation of his opinion to that effect. The bill shortly came back to him endorsed with the initials of the foreman of the Grand Jury, The Judge took this to be a sign of concurrence with his view, and put the man upon his trial; whereupon the accused immediately pleaded guilty, and was remanded for sentence next day. Soon afterwards the foreman of the Grand Jury came into court, and finding what had been done, informed the Judge that a wrong construction had been put upon his (the foreman's) signature, which had been intended to mean that the Grand Jury adhered to its decision. The Judge thereupon recalled the prisoner, and informed him that the Grand Jury appeared to know more about the matter than either the accused or the Court, and had declared him to be innocent of the offence charged, which made it the legal duty of the Judge to order his discharge, notwithstanding his confession of guilt. The prisoner was discharged accordingly, without, so far as the record goes, being even cautioned not to do it again. We trust, however, the wrench to his nervous system caused by this curious freak on the part of the legal machine will have the desired deterrent effect.

MARRIED WOMEN'S PROPERTY ACT.

A further judicial inroad has been made on the provisions of this Act. It having been determined, *In re Shakespear, Deakin* v. *Lakin*, 30 Chy.D., 169; *Palliser* v. *Gurney*, 19 Q.B.D., 519; *Tetley* v. *Griffith*, 36 W. R., 96; 56 L.T., N.S., 673: *Meager* v. *Pellew*, 14 Q.B.D., 973; *Beckett* v. *Tasker*, 19 Q.B.D., 7; *Molson's*

Bank v. *Drew*, 9 C.L.T., 167; *Moore* v. *Jackson*, 25 C.L.J., 409; *Bank of Commerce* v. *Woodcock* (before Ferguson, J., 16 Oct., 1889), that it is necessary in an action on a contract made by a married woman for the plaintiff to allege and prove that she had at the time of the contract some separate property: it has now been held in England in *Leake* v. *Duffield* (by Matthew and Wills, JJ.), 88 L. T. Jour., 45, that it is not only necessary to prove that she had separate property, but that the plaintiff must go a step further, and prove that she had separate property which she might reasonably be deemed to have intended to bind by the contract. In this case the only separate property the married woman was proved to possess at the date of the contract was the wearing apparel of herself and children, and this was held insufficient.

The Act provides that not only the separate property which a married woman had at the date of the contract, but also that which she acquires at any time after, is bound thereby; but the decision of the Courts have established that if a married woman make a contract, not having at the time any separate property which she may be presumed to have intended to bind, then, though she subsequently acquires ample separate property to meet the obligation she has incurred, it will nevertheless not be bound. It does not appear to us that the current of legal decisions in this respect conducive to common honesty.

We believe the true legislative remedy for the difficulties attending the construction of the Act was pointed out in our columns *ante* vol. 20, pp. 279-280, where we predicted that the Act, as at present framed, was liable to the construction which has since been placed upon it.

DOMINION QUEEN'S COUNSEL—RECENT APPOINTMENTS.

The *Canada Gazette* has recently given the list of a new batch of Her Majesty's "Counsel learned in the law." This list has caused surprise to the public and laughter among the profession. The profession has long since ceased to look upon the addition of Q.C. to the name of a professional man as an honour. That which was some years ago a mark of professional distinction has now ceased so to be. Speaking generally, and not referring to some few honourable and deserving names in the present and recent lists, the letters Q.C. are now accepted as conveying to the public the intimation that the recipient, if a known supporter of the "powers that be," has at some previous time in some way or other been a convenience to or done some political service for the "party." It indicates nothing as to his forensic ability, legal knowledge and professional standing, which used to be necessary attainments for the office: nor does the Dominion Government appear to have given silk to barristers because of services to the profession by literary labours or otherwise, or because they have been elected as Benchers of the Law Society, both of which cases may presumably be considered as entitled to honourable distinction. In fact, the appointment is now known either as an easy way of paying a compliment to a lawyer for whom there is no substantial

solatium at the time available; or as an inexpensive mode of pleasing one who is a political supporter by the appointment of some local ally of his in the legal fraternity. This sort of thing is of course an insult to the profession, and makes a laughing-stock of the Minister of Justice, who is, we presume, the responsible person. Sir John Thompson of course knows nothing personally or professionally of most of the appointees, and it is really hardly fair to perpetrate such a practical joke upon a stranger to the profession in Ontario. We must say that by his recommending some of the persons for the rank of Q.C. he has materially lowered the standard which regulated the appointment prior to 1867, or even prior to 1874. Some of the names in the last list are good; some, indeed, should have been remembered long ago; some are almost unknown outside of their own localities; and, of some few, the less said about their professional reputation the better.

The profession in England, we have been told, are beginning to judge of their brethren in Canada, and that unfavourably, by reason of the natural supposition that those who hold the office of Q.C. in this country are, as a whole, superior to those who do not. We think we may safely say that this is not the fact; and it is eminently unfair to those who *are* entitled to the distinction to be classed with those who *are not* so entitled.

It is now generally conceded that the Ontario Government should place itself in a position to appoint Queen's Counsel. They have recently tried their hand at a selection of names, and their list, which is on the whole a good one, appears to be generally acceptable to the Bar of Ontario. It is in this respect in striking contrast to that of the Dominion Government. At the same time we must reiterate our often expressed opinion that the distinction should be confined to the few and not given to the many: and if this be so there are several names on this list which have no claim to be there. The fact is, as one of the leaders of the Ontario Bar recently remarked, it would be much better to abolish the title of Queen's Counsel altogether, as it has now lost all the distinctive merit it once possessed.

A subscriber, oppressed by the same feeling of disgust as many others, makes a suggestion which has some interest in this connection. It is that the old title of Sergeant-at-law should be restored. We give his thought in his own words: "We have any number of Q.C.'s, indeed so many that that title is fast losing any significance. This being the case, a higher title, demanding greater attainments and respectability, such as the one indicated, ought to be of great service to the profession. In common with many others of the profession, I would be much pleased to see in your columns the opinions of others on this important subject."

DIARY FOR DECEMBER.

1. Sun.....*1st Sunday in Advent.*
3. Tues...General Sessions and County Court Sittings for Trial in York.
5. Thu....Chancery Division High Court of Justice sits.
7. Sat.....Michaelmas Term and High Court of Justice Sittings end. Last day for call notices for Hiliary Term. Sir W. P. Campbell, 6th C.J. of Q.B., 1825.
8. Sun.....*2nd Sunday in Advent.*
10. Tues...General Sessions and County Court Sittings for Trial, except in York.
14. Sat.....Prince Albert died, 1861.
15. Sun.....*3rd Sunday in Advent.*
17. Tues...First Lower Canadian Parliament met, 1792.
18. Wed...Slavery abolished in the United States, 1862.
21. Sat.....Shortest day.
22. Sun.....*4th Sunday in Advent.*
24. Tues...Christmas Vacation begins.
25. Wed...Christmas day. Sir M. Hale died, 1676, æt 67.
27. Fri.....J. G. Spragge, 3rd Chan., 1869.
29. Sun.....*1st Sunday after Christmas.*
30. Mon....Holt, C.J., born 1642.

Early Notes of Canadian Cases.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

STREET, J.] [Nov. 12.

THATCHER *v.* BOWMAN.

Landlord and Tenant - Ten years' lease by owner of life estate to reversioner in fee—Action by executrix for rent—Covenant in lease—"Heirs and assigns—Estoppel—Shewing title of landlord at an end—Reformation of lease—Evidence - Acquiescence.

N. B., who had a life estate in certain lands, in 1882 made a lease of them for ten years to E. B., who was entitled to the reversion in fee. The reservation of rent in the lease was to the lessor simply, and the covenant for payment of rent was "with the said lessor, her heirs and assigns" for payment to "the said lessor, her heirs and assigns."

N. B. died in 1887, before the expiry of the ten years, and this action was brought by the executrix of her will to recover (*inter alia*) the instalments of rent which became payable, as it was alleged, upon the lease after her death.

Held, that, as the interest of N. B. was a freehold interest, the plaintiff could not recover either as being entitled to the reversion of a chattel interest or as being the person designated by the covenant.

Held, also, that there was no estoppel to prevent E. B. from shewing that the title of N. B. had come to an end, and that he himself became the owner upon her death.

E. B. set up an agreement between himself and N. B. that the lease should expire at her death in case she should not live for the full term of ten years, and asked that the lease should be reformed accordingly. The only evidence in support of this was that of E. B. and his wife, and of a relative of theirs, whose memory was shewn to be untrustworthy.

Held, that this evidence was not sufficient, after so many years of acquiescence and after the death of the lessor, to justify the reformation of the lease.

Boyd for plaintiff.

Hardy, Q.C., and *H. J. Wilkes* for defendant.

STREET, J.] [Nov. 25.

IN RE MCCORMICK AND TOWNSHIP OF HOWARD.

Municipal Corporations - Drainage by-law - R.S.O., c. 184, ss. 571, 572—Motion to quash —Notice of intention to move must be given by actual applicant.

Held, that a municipal drainage by-law, whether for the construction of an original work or the improvement of an old one, and whether the proceedings are taken under s. 583, 585, or 586 of the Municipal Act, R.S.O., c. 184, is subject to the provisions of ss. 571 and 572 requiring notice in writing to be given within ten days by anyone intending to apply to have the by-law quashed of his intention to so apply.

And where such notice was given by a solicitor and signed by him as solicitor for C. J. and D. McC., stating that the application would be made on behalf of J. C., D. McC., and others, and an application to quash was afterwards made to the Court by persons other than C. J. and D. McC.

Held, that the application was not made to the Court by any person who had given the notice required by ss. 571 and 572; that another ratepayer could not take advantage of the notice by adopting it as his own; and the application of which notice had been given not having been made, the by-law became a valid one at the expiration of six weeks from its final passing; and the motion to quash it was dismissed with costs.

W. R. Meredith, Q.C., and *Charles McDonald* for the motion.

M. Wilson contra.

BOYD, C.] [Dec. 3.

CHARD *v.* RAE.

Executors and Administrators—Action upon a judgment—Grant of administration after action begun—Plaintiff not primarily entitled to administer—Right of widow to administer—Renunciation after action—Statute of Limitations, R.S.O., c. 60, s. 1—Parties—Joint judgment.

The rule in equity is that when a person is entitled to obtain letters of administration he may begin an action as administrator before he has fully clothed himself with that character; but the same doctrine does not obtain where the person immediately entitled to obtain administration is not the one who begins the action.

Trice v. *Robinson*, 16 O.R., 433, distinguished.

Where the point is specially raised on the pleadings as to the time when the letters of administration were obtained, it devolves upon the Court to ascertain whether an action was begun in time by a properly constituted plaintiff.

The father of the plaintiff obtained judgment against L. & R. in an action upon a promissory note on the 26th October, 1868, and the plaintiff began this action against L. & R. upon the judgment on the 22nd October, 1888. At that time the plaintiff's father was dead, and no personal representative of his estate had been appointed. On the 4th November, 1888, letters of administration to his father's estate were granted to the plaintiff, the widow renouncing probate on the same day. Subsequently to that the statement of claim was delivered and the action continued against R. alone. R., by his statement of defence, put the plaintiff to the proof of his position and title to sue on the judgment, and set up amongst other defences, the statute R.S.O., c. 60, s. 1.

Held, that the widow was the person primarily entitled to administer, and as she had not renounced when the action was begun, the plaintiff had at that time no status; and as against the Statute of Limitations that no action was rightly begun within the period of twenty years fixed by the statute as that within which an action upon a bond or other specialty shall be commenced; and therefore the action failed.

Semble, also, that an objection raised at the trial that L. was not before the Court was a valid one; for an action on a joint judgment is not different in principle from an action of contract against joint contractors.

Dickson, Q.C., for plaintiff.

Clute for defendant.

Div'l Ct.] [Dec. 3.

BLACKLEY *v.* DOOLEY.

Sale of goods—Payment by instalments—Property remaining in vendor—Transfer by vendor of his interest—Removal of goods by third party — Conversion — Trover — Detinue — Parties.

B. delivered to Mrs. M. a piano, for which she agreed to pay $275, $50 down and the balance by instalments; it was also agreed between them that the piano should remain the property of B. until the payments were completed, and that upon any default in the payments B. should have the right to remove the piano. Default was made in these payments; the plaintiff purchased the notes representing them, and took from B. a transfer under seal of his property in the piano. Before the plaintiff acquired his interest, D., the agent for B., who had made the agreement with Mrs. M. and who was aware of B.'s rights, paid Mrs. M. $50 and was allowed by her to remove and did secretly remove the piano. D. had left B.'s employment at this time, and was acting adversely to him.

This action was brought against D., Mrs. M. and her husband, to recover the piano or its value, with damages for its detention. It was not proved that any demand had been made upon D. for the return of the piano. It was objected by the defendant that neither detinue nor trover would lie.

Held, that the plaintiff was entitled to recover damages against D. for the conversion of the piano; for it was not necessary to impute the conversion to any particular period of time, and the defendant's denial after action of the plaintiff's right to the piano, could be treated under the circumstances as evidence of a conversion before action by the defendant of the plaintiff's interest in it; and as against technical objections raised by a wrong-doer, the benefit of all possible presumptions should be allowed.

Held, also that it was not necessary that B. should be added as a party in order to entitle the plaintiff to succeed.

Finlay for the plaintiff.

F. Fitzgerald for the defendant.

Full Ct.] [Dec. 4.

REGINA *v.* SPAIN.

Summary conviction — Malicious Injuries to Property Act, R.S.C., c. 168, s. 59—Uncertainty—Nature of Offence and property not particularly described.

A summary conviction under R.S.C., c. 168, s. 59, alleged, in the words of the statute, that the defendant unlawfully and maliciously committed damage, injury, and spoil to and upon the real and personal property of the Long Point Company.

Held, that this was not sufficient without its being alleged what the particular act was which was done by the defendant which constituted such damage, etc., and what the particular nature and quality of the property, real and personal, was in and upon which such damage, etc., was committed; and the conviction was quashed for uncertainty.

C. E. Barber for plaintiff.

Robb contra.

BOYD, C.] [Dec. 7.

ROBINSON *v.* BOGLE.

Trade name—"Belleville Business College"—Action to restrain use of designation—Non-appropriation of name by plaintiffs—Public user of name in relation to plaintiffs—Requisite that name should be specific and not merely descriptive.

The plaintiffs in this action sought to restrain the defendant from using the name "Belleville Business College" as the designation of a commercial school conducted by him in the city of Belleville. The plaintiffs had conducted a similar school in Belleville for about twenty years before the defendant began his, but "Belleville Business College" was not the registered name of the plaintiffs' establishment, nor did they themselves use that name in any way. Some people, however, had fallen into the way of speaking and writing of it as "Belleville Business College," it being for some time the only business college at Belleville; and after the defendant's advent confusion arose in the post-office from letters addressed simply "Belleville Business College" arriving there; but it was not alleged or proved that any students were lost to the plaintiffs by reason of the defendant's conduct.

It was found as a fact that the name was never appropriated by the plaintiffs, and that as used by other people it was merely indicative of the work done by the plaintiffs and the place where it was done.

Held, that the public use of such a name in such a way, however widely diffused, could not attach the designation to the business so as to be equivalent to the proprietors' personal use of it; the title to such a name is based on priority of appropriation; and an actionable right could not exist in the plaintiffs unless the reputation had grown out of a visible connection by the plaintiffs themselves of the name with the business. (2) That there was nothing special or peculiar about the name entitling the plaintiffs to a monopoly by reason of its popular use in reference to them: in order to so entitle them the name should be something more than merely generic or descriptive; it should be specific or distinctive; and, in the absence of evidence of user of the name by the plaintiffs, or that the name of the locality was so inseparably connected with their establishment that a secondary meaning was to be attributed to it, there was no ground for protecting the name.

Thompson v. *Montgomery*, 41 Chy.D., distinguished.

The action was dismissed; but no costs were given to the defendant because he had sought to advantage himself in an unmeritorious way.

McCarthy, Q.C., *Burdett*, and *W. N. Ponton* for the plaintiffs.

Clute and *J. J. B. Flint* for the defendant.

STREET, J.] [Dec. 12.

IN RE FERRIS AND EYRE.

Arbitration and award—Misconduct or arbitrators—Receiving ex parte statements—Affidavits on motion.

Upon a motion to set aside an award on the ground that arbitrators improperly received statements from one of the parties in the absence of the other,

Held, that it is not necessary in such a case to impute any intentional impropriety of conduct to the arbitrators, nor to show that their decision has been in any way influenced by what has occurred; it is only necessary to show that their minds may possibly have been influenced against the applicant by the communications that have taken place.

And where it appeared that after the close of the evidence and while the arbitrators were considering it, some explanations in regard to an account were given to them by one party to the arbitration, in the absence of the other on a certain evening, and that when the arbitrators and the parties all met the next morning, one of the arbitrators said that they had had an explanation about the account, and wanted to know what the other party had to say about it;

Held, that the award was bad and must be set aside.

Upon the motion an affidavit tendered in reply was rejected because it contained only matter which supported the case made out by the original affidavits and depositions filed, and an affidavit in rejoinder was also rejected.

Moss, Q.C., for the applicants.

W. R. Meredith, Q.C., contra.

Chancery Division.

BOYD, C.] [Oct. 14.

WORTS AND WORTS.

Will—Construction—Investment—Joint Stock Company—Income.

J. G. Worts by his will authorized his trustees "to invest in such securities as they should think proper, with power to retain any investments existing at his death as long as they shall see fit." He also authorized them to continue his firm business, in which he was engaged, for one year after his death if they saw fit.

A few months after the testator's death his said firm business was converted into a joint stock company, the assets of the testator being valued and put in as so much stock.

Held, that technically this was a breach of trust, and the use of the money of the estate in the business not a proper investment under the will.

Investment is not a proper term as to money in trade; "securities" meaning such securities as bind lands or something to be answerable for it.

The joint stock company business was prosecuted for seven years, when the interest of the testator's estate was bought out at a large advance by the surviving partner.

Held, that under the circumstances of this case, which did not raise the question between tenants for life and remaindermen the profits derived from the above use of the capital of the estate were, properly considered, income, and to be applied accordingly by the trustees of the will.

Moss, Q.C. and *T. P. Galt* for the plaintiffs.

Robinson, Q.C., *Lash*, Q.C., *McCarthy*, Q.C., *Hoskin*, Q.C., *A. R. Creelman*, and *W. Macdonald* for various defendants.

Div'l Ct.] [Oct. 19.

ANDERSON *et al. v.* THE SAUGEEN MUTUAL FIRE INSURANCE CO. OF MOUNT FOREST.

Insurance and insurance companies — Time within which proofs of loss to be made and action commenced—Mortgage clause—Default of mortgagor—Subrogation—Premium note—R.S.O., c. 167, s. 131.

W. insured his mill with the defendants for $1,000. At the time of the insurance the mill was mortgaged to P. The defendants gave a policy payable on its face to the extent of $500 to P. as mortgagee or as his interest should appear. A mortgage clause was on a separate slip attached to the policy. The fire took place October 10th, 1887, and proofs of loss were made by W. September 28th, 1888, and by P. for himself September 20th, 1888, and action commenced October 8th, 1888. In an action by W. and the executors of P. against the Company,

Held (affirming BOYD, C.), that the mortgagee was not bound as "the assured" under statutory condition 12 to make proofs of loss, and that the person assured is the person to make them under conditions 12 & 13.

Held, also, that the neglect of the assured to make the proofs of loss in proper time, so that the sixty days thereafter might expire before the termination of the year after the loss within which an action could be brought under condition 22, was a neglect, from the consequences of which the mortgagee was relieved by the mortgage clause, and that as far as he was concerned the action was not brought too soon.

Held, also, that the words "*shall claim* that as to the mortgagor no liability exists" in the mortgage clause, mean "and as to the mortgagor no liability exists," and that as the policy was valid at the time of the fire, and nothing was shown to have taken place since to render it invalid, there was a liability to the

mortgagor; that condition 22 barred the remedy and not the right, and that the defendants were not entitled to subrogation.

Held, also, that the mortgagor was bound to make the proofs in such time that the sixty days would elapse before the expiration of the year limited for bringing the action and his remedy as to the other $500 of the policy.

Held, also, that as against the mortgagee the Directors of the Company were not entitled to retain the amount of the premium note under R.S.O., c. 167, s. 131; if it was paid they had no claim, and if not paid it was the default of the mortgagor, from the effects of which the mortgagee was protected by the mortgage clause.

Lash, Q.C., for the plaintiffs.

Wm. Kingston for the defendants.

Div'l Ct.] [Oct. 19.

LEMAY *v.* THE CANADIAN PACIFIC R.W. CO.

Railways and railway companies — Employer and employee—51 Vict. c. 29 (D), ss. 262 and 289—"Persons injured thereby"—Answers of jury—Negligence—Volenti non fit injuria.

Plaintiff was a switch foreman in the employ of the defendants, and in uncoupling cars got his feet caught in an unpacked frog and crushed by a car. In an action in which it was contended that the plaintiff, being an employee of the company, was not within the meaning of the statute 51 Vict., c. 29 (D), ss. 262 and 289, in which two of the questions submitted to the jury were: 1st, "Did the plaintiff, before the happening of the accident, have notice or knowledge; or ought he to have had notice or knowledge that the frog was not packed?" and the answer was, "We believe he did not have notice and should have had notice." And 4th, "Was the plaintiff guilty of contributory negligence?" Ans. "We do not believe that he was."

Held (affirming FALCONBRIDGE, J.), that the plaintiff came within the definition "Any person injured thereby," in s. 289, and that to leave track and switchmen out of the benefit of the Act would be to minimize its scope and violate one of the main causes of interpretation laid down by the Legislature, whereby all Acts are remedial and to be liberally construed (R.S.C., c. 1, s. 7, s-s. 56).

Held, also, that even if the answer to the first question was taken to mean that the defendant should have himself known that the frog was not packed, instead of the more obvious meaning that the company did not notify him as they should have done, that would not prevent him recovering, so long as he was not himself negligent, as proved by the fourth answer.

Thomas v. *Quartermaine*, 18 Q.B.D., at p. 697, referred to.

Held, also, that there was no evidence which would warrant such a finding as is defined by WILLS, J., in *Osborne* v. *London and South Western R. W. Co.*, 21 Q.B.D., at p. 224, as that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it, and that the maxim *volenti non fit injuria* did not apply.

Shepley for the appeal.

Delamere and *Frank Keefer* contra.

FERGUSON, J.] [Oct. 25.

WOODHILL *et al v.* THOMAS *et al.*

Will—Devise—Period of distribution—Duration of annuity—Death of annuitant—Who entitled—Vested interest.

A Testator by his will provided as follows:—"I give and devise to my four daughters (naming them) an annuity of $120 per year each, to be paid one year after my decease, and to be for the period of their natural lives. Also to my two granddaughters (children of a deceased daughter) an annuity of $60 each, to be paid annually . . . which annuity will expire at the death of my last daughter. In the event of the death of any of my daughters, the annuity which she received during life to be equally divided amongst her children until the decease of my last daughter, share and share alike. In the event of the death of my last surviving daughter the annuities are immediately to cease and the amount of real and personal estate in the hands of the executors is to be equally divided among my grandchildren, provided they are not lazy spendthrifts, drunkards, worthless characters, or guilty of any act of immorality." One of the granddaughters named married and died, leaving an infant child, and her husband was appointed administrator of her estate.

Held, that each annuity given was to continue to the death of the last surviving daughter, and

that the annuity of the deceased granddaughter from the time of the last payment to her until the death of the last surviving daughter was payable to her proper personal representative for the benefit of those who were, according to law, entitled to her estate.

Held also, that the interest taken by the deceased granddaughter, in the property to be divided by the executors, was a vested interest subject to be divested by the clause, as to lazy spendthrifts, etc., which clause was not a condition precedent, but rather in the nature of a condition subsequent, and that her personal representative became entitled to it.

Latta v. *Lowery*, 11 O.R., at 519, quoted from.

Middleton for the executors.

Moss, Q.C., for the infant great-grandson.

McCullough for an administrator.

J. H. Macdonald, Q.C., for the children and grandchildren.

BOYD C.] [Nov. 27.

LAWLESS *v.* CHAMBERLAIN *et al.*

Marriage under intimidation and threats—Conduct of the parties—Action to declare it a nullity—Jurisdiction—Consent of parents to infants marriage—26 Geo. II., c. 33, s. 11.

To dissolve a marriage once validly solemnized, is not of judicial but of legislative competence, whereas if the alleged marriage has been procured by fraud or duress in such wise that it is void *ab initio*, judgment of nullity may be given by the Court.

When a marriage *de facto* is ascertained to be void *de jure* by reason of the absence of some preliminary essential the action of the Court does not annul, but declares it was from the first null and void. There is jurisdiction to grant this measure and manner of relief now vested in the Superior Courts of Ontario.

In cases of annulling marriages, nothing short of the most clear and convincing testimony will justify the interposition of the court.

Plaintiff having gone to the home of the defendants, the father entered the room with a pistol in his hand, which he pointed at plaintiff, and threatened that if he did not marry his daughter, he should not leave the house alive. Other relatives came in, and the father became more quiet. Plaintiff consented to be married, and a clergyman was sent for, but when he came plaintiff told him he was a minor and had not obtained his father's consent, and had been placed in his then position at the head of a revolver. The clergyman then refused to perform the ceremony, and went for another. When the two returned plaintiff expressed his willingness that the ceremony should proceed, but neither would officiate. On a suggestion that the parties should go to a neighboring city, procure a license and have the marriage performed there, plaintiff consented, and drove an uncle of the defendant to the city in his conveyance, obtained the license, representing his age as twenty-two, and arranged with the city clergyman who performed the ceremony, and who at the trial testified that plaintiff answered the usual questions in the marriage service so that he (the clergyman) had no reason to suspect he was not a willing party.

Held, that although evidence of intimidation might be found at one point of time during the transaction, that was not enough. It must be manifest that force preponderated throughout so as to disable the one influenced from acting as a free agent; that although plaintiff at first protested, by his subsequent conduct he displayed a readiness to assist in the preliminary details, and submitted to the proposed method of procedure and forwarded its accomplishment; the necessary consent to the union was proved as to both parties, and the religious observance was not a mere idle ceremony, but was the final step in the actual constitution of marriage.

Held, also that sec. 2 of 26. Geo. II., c. 33 (Lord Hardwick's Act) was not in force in this province.

Gemmill and *Chrysler* for the plaintiff.

McCarthy, Q.C., and *Harcourt* for the infant defendant.

BOYD, C.] [Dec. 6.

RE J. T. SMITH'S TRUSTS NO. 2.

Moneys in Court—Application to pay out to trustees—Trustee company—Party entitled to income—Retention in court—Remainderman.

On an application by a Trustee Company and a party who was entitled for life to the income of a fund in court, which was the proceeds of the sale of certain settled estates for the payment out of the fund for the purpose of investment by the company as trustees (they having been appointed the trustees under the will which devised the settled estates) which appli-

cation was opposed by the official guardian, on behalf of the remainderman.

Held, that the practice and current of authority were against what was asked by the petitioners, and that they were not entitled to it as a matter of right, and that the application must be dismissed.

Arnoldi for the petitioners.

J. Hoskin, Q.C., official guardian for the remainderman.

BROWN *et al. v.* GROVE *et al.*

Fraudulent conveyance — Assignment for the benefit of creditors—Sheriff as assignee-Death of Sheriff—Deputy and successor as assignees —Refusal to act—R.S.O., c. 124.

In an action by a judgment creditor to set aside a conveyance made and the proceedings had under a power of sale in a mortgage (by which certain property was transferred) as in fraud of creditors,

Held (affirming ARMOUR, C.J.), that upon the evidence the plaintiffs could not succeed.

Held, also, that the plaintiffs had no *locus standi*, because an assignment for the benefit of creditors had been made by the owner of the property to the sheriff, and although the sheriff was dead and nothing had been done under the assignment since, the individual creditors could not sue without first getting rid of it: that by R.S.O., c. 124, assignments for the benefit of creditors made to a sheriff are made to him as a public functionary, and on his death the administration and care of the assigned estate devolves upon his deputy and thereafter upon his successor in office. It is not competent to the sheriff as a public officer to disclaim or decline to act as assignee. He has no such option as might exist in the case of a private assignee.

W. Nesbitt and *Lees* for plaintiffs.

Lash, Q.C., for defendants.

Practice.

C.P. Div'l Ct.] [Nov. 26.

SIERICHS *v.* WOODCOCK.

Notice of motion—Divisional Court—Rule 800, construction of.

Upon the proper construction of Rule 800, a notice of motion to a Divisional Court must be made returnable on the first day of the sittings. But where, although the notice of motion had been made returnable on the fifth day of the sittings, it appeared that there had been a *bona fide* intention to move ten days before the sittings, when the notes of evidence were ordered, leave was given to set the motion down, costs being given against the party moving.

Aylesworth for the plaintiff.

C. J. Holman for the defendant.

STREET, J.] [Nov. 29.

MCDOUGALD *v.* THOMSON.

Dismissing action—Want of prosecution—Failure to enter for trial—Notice of trial—Rules 647, 663.

Where the plaintiff fails to enter the action for trial at a sittings for which he has given notice of trial, the action cannot be dismissed for want of prosecution under Rule 647; the defendant's remedy is to enter the action himself under Rule 663.

Crick v. *Hewlett*, 27 Chy.D., 355, distinguished.

George M. Barton for the plaintiff.

Gunther for the defendant.

BOYD, C.] [Dec. 3.

BRITISH AMERICAN L. & I. CO. *v.* BRITNELL.

Discovery — Rule 928—Examination under— "Transfer" from judgment debtor—"Assignment" for creditors under R.S.O., c. 124.

"Transfer" used in Rule 928 is not intended to cover an "assignment" for the general benefit of creditors, valid and sufficient under R.S.O., c. 124, and an assignee under that Act is not one of the persons to be subjected to examination under that Rule.

R. A. Grant for plaintiffs.

Arnoldi for assignee of defendant.

MACMAHON, J.] [Dec. 3 and 12.

KINGSLEY *v.* DUNN.

Judgment under Rule 739—Affidavit of defendant—Cross-examination of plaintiff—No discretion to refuse—Costs.

Upon a motion for judgment under Rule 739 the defendant may satisfy the Judge that there is a good defence otherwise than by affidavit; and one means of doing so is by cross-examin-

ation of the plaintiff on his affidavit filed in support of the motion.

And where the defendant was sued as administratrix of her late husband upon a promissory note made by him, and upon a motion by the plaintiff for judgment under Rule 739 filed an affidavit in which she did not set up any defence;

Held, nevertheless, that there was no discretion to refuse her an opportunity of cross-examining the plaintiff; and upon an appeal from the decision of a local Judge refusing an enlargement for such purpose and allowing the plaintiff to sign judgment, a direction was given that the plaintiff attend at his own expense for cross-examination, and although upon such cross-examination the defendant could not shew that she had any defence, and the order for judgment was affirmed, she was allowed a portion of the costs of a successful appeal.

H. Cassels for plaintiff.

W. M. Douglas for defendant.

STREET, J.] [Dec. 4.

IN RE SOLICITOR.

Solicitor and client—Bills of costs rendered to executors for services to estate—Residuary legatees may apply for taxation—R.S.O., c. 147, ss. 32, 42—Place of reference—Agency work done in Toronto—Discretion—Special circumstances—Amount of bills—Retaining fees.

Residuary legatees may apply for taxation of bills of costs rendered to executors for services to the estate; for they come within s. 42 of the Solicitors' Act, R.S.O., c. 147, as being "liable to pay," *i.e.*, by the lessening of the amount of the residuary estate.

Where the proceedings in respect of which bills of costs were rendered were carried on principally at Belleville, but the bills were made up in part of charges for agency work done at Toronto;

Held, that there was a discretion under s. 32 of the Solicitors' Act, R.S.O., c. 147, to refer the bill to a taxing officer at Toronto, instead of at Belleville; but that discretion should not be exercised in favour of Toronto in every case where agency work is done there, and should not be exercised unless under special circumstances.

And in this case the large amounts of the bills, and the fact that retaining fees were charged by the solicitor, were looked upon as special circumstances.

Middleton for the applicants.

C. J. Holman for the solicitor.

STREET, J.] [Dec. 10.

In re SWEETMAN AND TOWNSHIP OF GOSFIELD.

Municipal by-law—Motion to quash—Notice of motion—Time—R.S.O., c. 184, s. 332—Rules 485, 526.

There is no power under Rule 485 or otherwise to shorten the four days notice required by R.S.O., c. 184, s. 332, as modified by Rule 526, to be given of a motion to quash a municipal by-law.

And where the last day for making the application was a Thursday, and notice was given on the preceding Monday for the intervening Tuesday,

Held, that the application could not succeed, even if the notice were regarded as one for Thursday.

Langton for applicant.

W. H. Blake for township.

STREET J.] [Dec. 10.

BRADT *v.* BRADT.

Examination—Taking depositions in shorthand—Power of examiner to delegate.

A special examiner or officer of the court taking an examination in a cause or proceeding pending in court has no power to authorize any other person to take down the depositions in shorthand; and a person cannot be compelled in the face of his objection to submit himself for examination where the examiner proposes to have the depositions so taken.

R.S.O., c. 44, s.s. 147, 148, and Rules 501-3 considered.

W. H. Blake for plaintiff.

Hoyles for defendant.

STREET, J.] [Dec. 11.

THOMSON *v.* GYE.

Discovery—Evidence—Foreign Commission—Examination of defendant before delivery of statement of claim—Special circumstances.

An order for examination before the delivery of pleadings, whether for discovery or evidence, should only be granted under exceptional cir-

cumstances and where absolutely necessary in the interests of justice. The plaintiff was seeking damages for breach of a contract made with persons whom he alleged to be agents of the defendant. Before delivering a statement of claim, and after many months had elapsed since appearance, the plaintiff obtained an order to examine the defendant under a foreign commission at Chicago, in the United States of America for the purpose, as he alleged, of obtaining information for the purpose of framing his statement of claim, and also for convenience, as the defendant was continually travelling about in the course of her career as a public singer, and it might not be possible to take her evidence later if it were not taken at Chicago, where she was shortly to be.

Held, that the circumstances were not such as justified the order, and it was set aside.

W. H. Blake for plaintiff.

C. Millar for defendant.

BOYD, C.] [Dec. 17.

IN RE BEATTY AND CITY OF TORONTO.

Costs—Arbitration and award—Expropriation of lands by municipal corporation—Award of costs "as between solicitor and client"—R.S. O., c. 184, s. 399—Error on face of award—Taxation of costs.

Section 399 of the Municipal Act, R.S.O., c. 184, provides, with regard to arbitrations under the Act, that the arbitrators shall have power to award the payment by any of the parties to the other of the costs of the arbitration, and may either direct the payment of a fixed sum or that the costs shall be taxed on either the scale of the High Court or of the County Courts, in which case the costs shall be taxed by the officer of the proper court.

Arbitrators directed that the costs of certain land-owners of arbitration proceedings to ascertain the compensation to be paid by a municipality for land expropriated should be taxed on the scale of the High Court "as between solicitor and client."

Held, that the judicial discretion of the arbitrators was exercised and expended when costs were adjudged according to a certain scale; and that the arbitrators had no power to give costs "as between solicitor and client"; and, as the error appeared on the face of the award, the municipality was not driven to appeal therefrom, but was entitled to claim the benefit of the excess of jurisdiction upon the taxation of the cost. The ruling of the taxing officer that the costs should be taxed as between party and party was affirmed.

W. N. Miller, Q.C., and *T. W. Howard* for the land-owners.

C. R. W. Biggar for the City of Toronto.

Div'l Ct.] [Dec. 20.

REGINA *v.* ARMSTRONG.

Costs—Appeal to Divisional Court from Judge in Chambers—Neglect to set down.

The defendant served upon the convicting magistrate notice of a motion by way of appeal from an order of a Judge in Chambers refusing a *certiorari* to remove his conviction, returnable before a Divisional Court on the first day of the Michaelmas sittings, but did not set the motion down for hearing before the sittings or take any step after serving the notice of motion to bring it to a hearing during the sittings.

The Court ordered the defendant to pay to the magistrates their costs of appearing to shew cause against the motion.

Langton for the magistrates.

BOYD, C.] [Dec. 20.

FAUCHIER *v.* ST. LOUIS.

Costs—Contribution between parties liable for —Reference, scope of—Costs of appeal from Master's report.

In an action by creditors to set aside a conveyance of land as fraudulent, a consent judgment was pronounced, which was so framed as to exclude creditors other than the plaintiffs from sharing in the proceeds of the property. Upon the petition of a creditor this judgment was opened up, the conveyance was declared fraudulent and void against all creditors, and a reference was directed to a Master to sell the lands and distribute the proceeds of sale among the creditors and incumbrancers. It was also ordered that the petitioner's costs should be paid by the plaintiffs and the two defendants.

The Master made a special finding in his report that the whole of the petitioner's costs had been paid by the defendant St. L. The latter appealed from the report on the ground that the plaintiffs should have been found liable to contribution in respect of these costs, and

also moved substantively for an order for payment of one-third thereof by the plaintiffs.

Held, that the Master was right under the terms of the reference not to deal with the question of contribution; but that the defendant St. L. was entitled to a substantive order against the plaintiffs for payment of one-third of the costs, because the plaintiffs were jointly liable with him and the other defendant therefor.

As there was no need to appeal, and the application might have been made in Chambers, no costs of it were given.

J. A. Macintosh for plaintiffs.

D. W. Saunders for defendant St. Louis.

C. P.] [Dec. 21.

REGINA *v.* RICHARDSON. REGINA *v.* ANDERSON.

Motion—Renewal of, where refused—Indulgence—Merits.

It is only by the indulgence of the Court that a second application is permitted or entertained, where the first application has been refused. And where the defendants' applications for orders *nisi* to quash convictions were refused upon the ground of non-compliance with the statute and rule requiring a recognizance and affidavit of justification to be filed, and the Court upon such applications was not favourably impressed by what was urged as the merits of the applications;

Held, that the indulgence of the court ought not to be extended in favour of fresh applications made by the defendants upon new material supplying the defects.

Du Vernet for defendants.

Law Students' Department.

CERTIFICATE OF FITNESS.

Mercantile Law—Practice—Statutes.

Examiner—R. E. KINGSFORD.

1. What is a *Bill of Lading?* Explain what statutory rights have been conferred upon the endorsees of such bills, and state the reason for the legislation.

2. Define chose in action. In an action by an assignee of a chose in action, what statutory requisite is there as to pleading?

3. A. being indebted to B. on a promissory note for $500, dated 3rd November, 1883, on 5th November, 1889, pays B. $100 on account, and B. (A. being present) endorses on the note a memorandum of such payment. A. never pays any more, and B. sues on the note, relying on the endorsement made by him as taking the case out of the Statute of Limitations. How far is B. right? Why? How far could he rely on the payment of the $100 apart from the memorandum?

4. A. is indebted to B. There are other creditors of A. besides B. B. wishes to get immediate judgment against A.: what procedure is forbidden to B. by statute? Indicate a mode of procedure whereby B. can secure immediate judgment against A. which he can hold against the other creditors. What practical check have the other creditors when B. tries to realize on his execution?

5. Where an assignor for the benefit of creditors is a member of two different co-partnerships, what statutory rule is laid down as to the priority in which the creditors' claims shall rank on the several estates?

6. What statutory requisites for the renewal of chattel mortgages?

7. To what extent is an agent entrusted with possession of goods deemed to be an owner thereof?

8. Upon what material and at what stage of an action can you obtain the oral examination upon oath of a party to such action touching the matters in question therein?

9. On what material can you obtain an order of Replevin?

10. In the undermentioned cases when can service out of the jurisdiction of a writ of summons be allowed by Ontario Courts? (*a*) Cases of Contract. (*b*) Rectification of deed.

Real Property and Wills.

Examiner—P. H. DRAYTON.

1. What, if any, distinction is there between the covenants for title in a statutory short form deed, and the statutory short form mortgage?

2. Explain the provisions of the Registry Act with regard to notice.

3. In searching a title you find a discharge of a mortgage to A., a deceased person, executed by B., one of three executors under A.'s will. Would you consider this a valid discharge? If so, why? If not, why not?

4. Under what circumstances will illegitimate children take under a will, under the general designation of children?

5. When is a title to real estate first shewn, and when is it made?

6. A., the owner of certain lots in Toronto, enters into a good and binding agreement with B. for the sale to him of the said lots, which agreement is dated the 1st November, 1889. On the 3rd November, *Fi. Fa.* lands are placed in the hands of the sheriff of the City before delivery of deed and completion of transfer. What effect has the *Fi. Fa.* lands on the lands of the vendor agreed to be conveyed?

7. Explain the doctrine of consolidation of securities, in how far is the same effected in regard to real estate by Provincial legislation?

8. Within what time must a purchaser of lands under process of Court, register his conveyance, and what might be the consequence of his not so doing?

9. What is meant by a Marketable Title?

10. A., a spinster, the owner of a farm acquired by her in January, 1885, intermarries with B. in June of the same year. In January, 1887, she agrees to convey the property to C., he (C.) desires the concurrence of the husband of A. to the conveyance. Can he successfully contend for it? Explain generally the law as laid down in Armour on Titles.

Equity.

Examiner—P. H. DRAYTON.

1. Distinguish between the practice of the Court in admitting parol evidence in a suit of specific performance on a contract of real estate: 1st. Where the plaintiff, seeking specific performance, wishes to incorporate a parol variation; 2nd, Where the defendant seeks to give the same in defence?

2. What are the general rules which govern in respect of restraint of publication of private letters?

3. State shortly the provisions of Statutes 13 Eliz., ch. 5, and 27 Eliz., ch. 4, and state what, if in any, way they have been effected by Provincial legislation.

4. What distinction is there, if any, as to the duty cast, 1. Upon a person applying for insurance (irrespective of any statutory enactments); 2. Upon a creitor obtaining a bond of security, as to disclosure of facts respectively within their knowledge?

5. A., the wife of B., sues him for alimony: B. admits the claim, but, wishing to be relieved from the worry of paying an annual sum, seeks to pay into Court the sum of $10,000 in lieu thereof. Will the Court permit him to do so? If not, why not?

6. What was the old law as to the separate estate of a married woman being bound by her contracts? Has it been in any way modified by Provincial legislation?

7. A. claims to be the patentee of a right to manufacture a certain article: he brings an action against B. for infringement of the same, seeking in his writ an injunction. Under what circumstances would the Court grant him an interim injunction?

8. A. and B. are arbitrators: in making their award, they spread a certain point of law on the face of their award: admitting the law, they decide contrary thereto on principles of equity and good conscience: the aggrieved party seeks to have the award set aside in consequence of their so deciding. Can he succeed? Explain.

9. What was the law as to the duty of purchasers from trustees to see to the application of the purchase money? Has it been in any way modified by Provincial legislation? If so, how?

10. State the several steps in an action of foreclosure on a mortgage where no appearance has been entered by the defendant.

CALL.

Harris on Criminal Law.—Broom's Common Law, Books 3, 4.—Blackstone, vol. I.

Examiner—R. E. KINGSFORD.

1. What is the gist of the crimes of *conspiracy* and *piracy* respectively?

2. Enumerate the cases in which an officer may lawfully kill a person charged with crime?

3. Distinguish the crime of *riot* and *affray*.

4. What are the rules of law in reference to the construction of (*a*) *penal statutes*, (*b*) *statutes against fraud?*

5. What is the effect upon a statute of a saving clause which is totally repugnant to the body of the Act? Why?

6. What is the rule as to the civil liberty of a lunatic for torts committed by him?

7. What is the difference between the liability of a master for the tort of his servant, and that of a person for a tort committed by one with whom he contracts for certain work to be done?

8. Give an instance of a wrongful act, which renders the wrongdoer liable to two separate actions by two different plaintiffs for injury to the same person or property.

9. What is the present doctrine as to *insanity* forming a defence to an indictment for murder?

10. Explain the doctrine of the ratification of torts.

Contracts—Evidence—Statutes.

Examiner—R. E. KINGSFORD.

1. Distinguish the duty of the Court and jury at a trial with regard to the construction of written instruments.

2. A. deals with B. knowing B. to be the agent for C. B. is indebted to A., and when C. sues A. on the contract made between A. and B. as such agent, A. claims to set off as against C. B.'s liability to him, A. How far can he do so? Why?

3. When a party deals with an agent whom he does not know to be an agent, how far does a contract arise between such party and the undisclosed principal?

4. What is meant by the term *Formal* Contracts as used by Pollock, and shew how they have been affected by the doctrine of consideration?

5. How far will a contract be valid for the doing of something the lawfulness of which depends on some event not within the control of the parties?

6. Where a difference of local laws is in question, how is the lawfulness of a contract to be determined?

7. Give instances where a promise to indemnify is implied by law.

9. Plaintiff's counsel at a trial seeks to cross-examine a witness on a previous statement made by the witness in writing. Defendants' counsel objects to the cross-examination proceeding without the writing being shown to the witness. How far is he right? Why?

9. A plaintiff desires to use as evidence a will duly proved in Newfoundland, and such will being sufficient to pass real estate in Ontario, how can he dispense with the original will, and yet put in the evidence?

10. An administrator takes out letters of administration after a promissory note comes due. He desires to sue on the note. When does the Statute of Limitations commence to run against him? Why?

Equity.

Examiner—P. H. DRAYTON.

1. A. makes a note for $1,000 to B., payable six months after date, dated the 1st of January, 1888. A. dies in May of that year leaving B. a legacy of $1,500. Can B. claim both the amount of the note and the legacy? Explain.

2. In what class of cases is it laid down as law that a Court of Equity will not interfere to mitigate a penalty or forfeiture when incurred?

3. A. enters into a binding agreement with B. for the purchase from him of his farm. The consideration is a fair one for agricultural lands, but A. is aware that the lands contain a valuable slate deposit, which fact he says nothing of to B. before the contract is finally completed. B. discovers the existence of the slate and refuses to carry out the bargain. A. brings an action for specific performance. Can he succeed? Give reasons for your answer.

4. What is meant by the terms "surcharge" and falsify, used in connection with the taking of an account in equity?

5. Under what circumstance will the Court decree the dissolution of a partnership during the term for which it is stipulated to continue?

6. What statutory provision is there (if any) regulating the class of investments open to a trustee for investing the trust funds of the estate?

7. A. B. and C. are sureties on a bond to D. for the sum of $10,000: B. becomes insolvent during the pendency of the bond, and, on default occurring, A. pays the $10,000. What is his remedy as against C.? Explain.

8. State briefly the rights and duties of a receiver in possession of an estate.

9. What acts of part performance of a parol contract for the sale of lands will suffice to take it out of the Statute?

10. Define "novation" and "subrogation," and illustrate each with an example.

Real Property.

Examiner—P. H. DRAYTON.

1. In a contract for the sale of a property by A. to B., a date is fixed for its completion: nothing is said in the contract with regard to

interest: the contract is not completed at the specified time. State the rules which govern as to whether or no B. can be called upon to pay interest.

2. What are the essentials of an agreement for the sale of land so as to bring it within the Statute of Frauds?

3. A., a married man, conveys property to B., his wife not joining to bar dower. At what period will the Statute of Limitations operate to bar the wife's dower.

4. What is a vendor's lien? In what way may it be waived? On whom would rest the burden of proof were waiver set up? How can lien be defeated?

5. Draw a clause for insertion in conditions of sale giving the vendor power to rescind under certain circumstances, and explain the extent of such a power.

6. To what extent can a purchaser call upon the vendor to furnish negative evidence of matters arising out of the abstract?

7. Upon an agreement for the sale of lands which is silent as to the growing crops. Who is entitled to them? Reasons.

8. What persons will be included in a bequest to nephews and nieces, and to cousins respectively?

9. What are the respective rights of vendor and purchaser, where a fire occurs, of property contracted to be sold, before sale completed, where the agreement for sale is silent as to insurance?

10. A devise to "A. and his children:" A. has no children at the time of the devise. What estate does he take?

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Latest additions:

Abbott's Trial Brief on the Facts, New York, 1889.

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Miscellaneous.

Littell's Living Age.—The numbers of *The Living Age* for the weeks ending Nov. 30th and December 7th have the following contents: A Problem in Money, *Nineteenth Century;* Eton Fifty Years Ago, *Macmillan's Magazine;* The Inhabitants of East London, *Quarterly Review;* Diary of an Idle Rector, *Blackwood's Magazine;* Australia Fifty Years Ago, *Nineteenth Century;* The Gardens of Pompeii, *Macmillan's Magazine;* The Swiss

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Law Society of Upper Canada.

MICHAELMAS TERM, 1889.

The following gentlemen were called to the Bar during the above term: *November 18th*—Bidwell Nichols Davis, Ernest Edward Arthur DuVernet, Donald Murdoch Robertson, Robert Gordon Smyth, Adrian Ignatius Macdonell, Herbert William Lawlor, Charles Elliott, Thomas Mulvey, Richard Lawrence Gosnell, George Newton Beaumont, Gordon James Smith, Wentworth Greene, George Davey Heyd, Frederic Barnard Fetherstonhaugh, George Henry Cowan, Donald Roderick McLean, William Pinkerton, William Banfield Carroll, Robert Segsworth, Reginald Murray Macdonald, Ranald David Gunn, James Wilson Morrice, and Charles Frontenac Smith, *December 7th*—George Carnegie Gunn.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz.: *November 18th*—R. G. Smith, B. N. Davis, H. L. Dunn, E. L. Elwood, J. W. Morrice, R. Segsworth, R. L. Gosnell, A. Elliott. *November 19th*—G. D. Heyd, T. Mulvey, A. I. Macdonell, D. R. McLean, G. H. Cowan, C. D. Scott, A. J. Forward, R. E. Lazier, S. D. Lazier, R. M. Macdonald, R. K. Orr, H. D. Cowan. *November 23rd*—D. T. K. McEwan, F. J. Travers, D. A. Dunlop, F. S. Mearns. *November 29th*—M. H. Ludwig, E. E. A. DuVernet, G. C. Gunn. *December 7th*—W. Pinkerton, J. T. Hewitt.

The following gentlemen passed the 2nd Intermediate Examination, viz.: W. T. Evans, T. G. A. Wright, W. F. Langworthy, H. C. Boultbee, F. Billings, F. T. D. Hector, E. N. R. Burns, L. Irving, C. P. Smith, W. F. Smith, C. Fraser, R. B. Matheson, J. J. Maclennan, A. S. Burnham, R. G. Pegley, F. W. Hill, J. B. Pattullo, T. J. Murphy, J. F. Macdonald, A. D. Crooks, A. G. McLean, S. C. Macdonald, D. J. Macmurchy, W. H. Garvey, G. Waldron, W. C. Smith, H. E. Stone.

The following gentlemen passed the 1st Intermediate examination, viz.: W. S. Morden, T. W. McGarry, W. J. McCamon, J. E. Bird, A. L. Malone, W. A. Lamport, A. Bicknell, W. J. Harvey, M. H. McLaughlin, P. Sherwood A. S. Macdonell, J. H. Madden, M. P. McDonagh, F. D. Boggs, W. H. Hodges, G. A. Sayer, W. H. Grant, J. A. Oliver, H. T. Berry, J. E. Jeffery, F. T. Costello, F. G. Evans, W. Farnham, N. Jeffrey.

The following gentlemen were entered as Students-at-Law and Articled Clerks, viz:—*Graduates*—Andrew Bain, Jasper Noble Fish, John Anketel Garvin, Robert Linton Johnston, Chas. Robert Hamilton, George Edmund Powell, John Robertson Blake, Caleb Sydney Coatsworth, Frank Christopher Cook, George Tait Copeland, Stewart Fielde Houston, Ford Jones, Pierre Antoine Chagnon LaRose, Francis Wallace McConnell, Thomas Robert Edward McInnes, William Wallace Burns McInnes, Henry William Charles Shore, Alex. Smith, James Grayson Smith, jr., John Francis Snetsinger. *Matriculants*—Robert Elliott Heggie, William Stafford Wilkie, Martin Hugh Roach, James Scott Brown, John Edward Cahoe, Chas. Will Craig, Wm. Stearne Deacon, Geo. Taylor Denison, jr., Joseph Fowler, George Reginald Geary, Joseph Rowan Grant, Ward Haynes, Gordon Henry Hayward, Leonard D'Arcy Hinds, James Jefferys Mahaffy, Fred. Campbell McBurney, Fred. Armand McDiarmid, Wm. Mulock, jr., Egbert Russell Purvis, Wm. Armstrong Robinson, Harvey James Sims, George Ruthven Stone, Herbert Lorne Watt. *Junior Class*—Gideon Grant, William Melville McClermont, David James McBride, Sydney Taylor Medd, George Bell Smith, William Archibald Hastings Kerr, Laird Selby Fraser, Henry Frank Hunter, Charles James Foy, Wm. Scott McCallum, Gibson Fulford Thomas Arnoldi, Robert James McPherson, Frank Wade, Alex. Fleming. *Articled Clerks*—Chas. Arthur Batson, Morgan Terence McSweeny.

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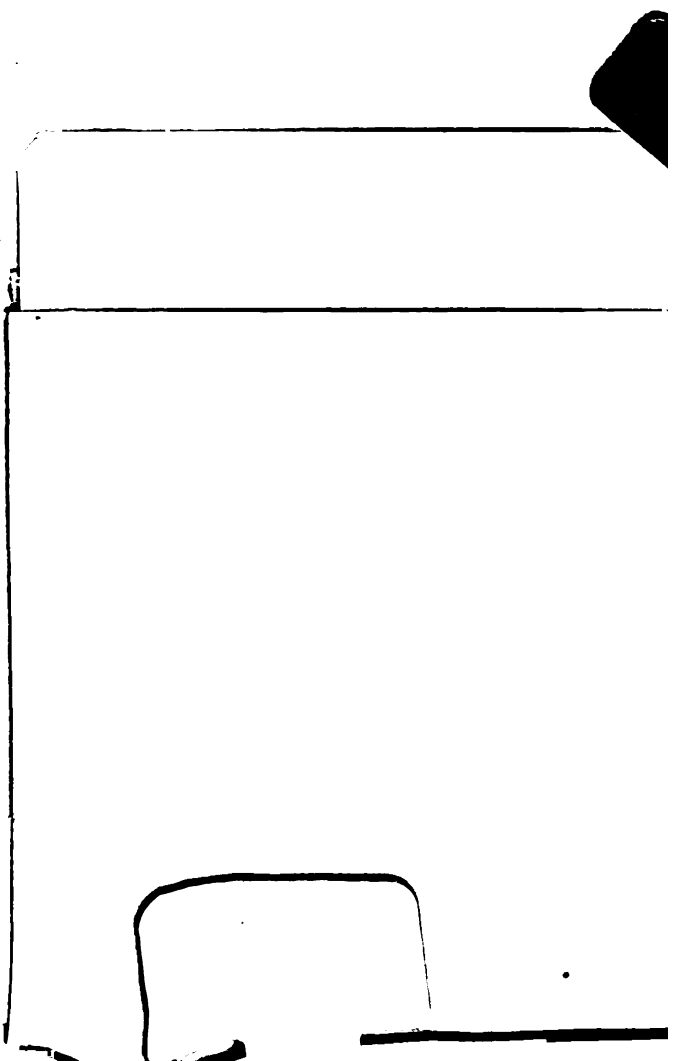
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